Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

DAN H. ANDERSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Tenth Circuit adopted an improperly broad construction of the Medicare Anti-kickback Statute, thereby erroneously instructing the jury under a "one purpose test" which effectively criminalized innocent conduct.

2. Whether, under the Fifth Amendment's guarantee of due process of law, and the notice and jury trial guarantees of the Sixth Amendment, a criminal defendant is entitled to a jury determination, beyond a reasonable doubt, of facts that supply a basis for sentence modifications under the "offense conduct" and "adjustment" provisions of the United States Sentencing Guidelines.

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OPINIONS BELOW

The revised Panel Opinion and Order of the United States Court of Appeals for the Tenth Circuit denying Petitioner's Petitions for Rehearing and Rehearing En Banc, are published as *United States v. LaHue*, 261 F.3d 993 (10th Cir. 2001), and are set forth in the Appendix at 1a-47a and 135a-136a. The ruling of the United States District Court for the District of Kansas on Petitioner's objections during trial and denying his motion for a judgment of acquittal, for new trial, and arrest of judgment is published as *United States v. Anderson*, 85 F.Supp.2d 1047 (D. Kan. 1999), and is set forth in the Appendix at 48a-129a.

JURISDICTIONAL STATEMENT

The opinion of the United States Court of Appeals for the Tenth Circuit was issued on June 18, 2001. Petitioner's timely filed Petition for Rehearing and Rehearing En Banc was denied on August 17, 2001. Pursuant to 28 U.S.C. § 2101 and Rule 13.1, this Petition is timely filed by Petitioner within 90 days. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1320a-7b(b) provides, in pertinent part, as follows:

> [W]hoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind . . . to any person . . . to induce such person . . . to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program . . . shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

Amendment V to the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI to the United States Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature

> and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

This case also involves U.S.S.G. §§ 2B4.1, 2F1.1, & 3B1.1. United States Sentencing Commission, *Guidelines Manual*, §§ 2B4.1, 2F1.1, & 3B1.1 (Nov. 2000).

STATEMENT OF FACTS

This petition presents an issue of enormous significance to the health care industry and to the proper interpretation of federal criminal statutes. Petitioner, former Chief Executive Officer of a hospital in Kansas City, Missouri, stands convicted of violating the Medicare-Medicaid Anti-kickback Statute, 42 U.S.C. § 1320a-7b(b), by entering into a consulting relationship with geriatric physicians, who performed services for and received payments from the hospital pursuant to written contracts. The district court specifically found – and there is no dispute – that the hospital-physician relationship at issue was beneficial to patients and saved money for Medicare. Yet a jury instruction allowed Petitioner to be convicted unless his motivation in paying the physicians was "wholly" free from any intent to induce Medicare patient referrals. This incalculably broad interpretation of the Anti-kickback Statute is not only grievously wrong as a matter of statutory interpretation, but it threatens to criminalize a host of everyday business practices in the health care industry, and to stifle innovative hospital-

physician arrangements. Certiorari should be granted to prevent this devastating result.

Expected to join in this petition as amicus curiae are the American Hospital Association, the Federation of American Health Systems, the Association of American Medical Colleges, the American Osteopathic Association and the Missouri Hospital Association, all of whom submitted an amicus brief in the Court of Appeals.

In addition, the Tenth Circuit failed to rule on petitioner's argument that he was entitled to a jury determination of facts that supplied the basis for sentence enhancement for "offense conduct" and "adjustments" under the United States Sentencing Guidelines, despite granting Petitioner leave to raise that issue in his briefing. This is an important question of federal law that has not previously been, but should be, settled by this Court.

In April 1999 a federal jury in the District of Kansas convicted Petitioner of one count of conspiracy, in violation of 18 U.S.C. § 371, and one count of violation of the Medicare Anti-kickback Statute, in violation of 42 U.S.C. § 1320a-7b(b).

Anderson had been the President and CEO of Baptist Medical Center ("BMC") in Kansas City, Missouri. In 1985, Baptist entered into written consulting agreements with two Kansas City area osteopathic physicians, Robert and Ronald LaHue, doing business as Blue Valley Medical Group ("BVMG"), whereby the LaHues were to assist Baptist in setting up and operating an Adult Health Care Clinic ("AHCC") for the treatment of frail elderly nursing home patients. *See* Appendix at 4a-6a. After the Baptist AHCC was established, the LaHues began to refer large

numbers of nursing home patients to the Clinic for needed regular and preventative medical care. The system developed between Baptist and the BVMG physicians was referred to as a "continuum of care", and provided much needed, high quality patient care to an otherwise under served patient population. Appendix at 56a-58a. It also included checks and balances to ensure patient choice was respected, and to prevent unnecessary patient admissions or overutilization of services. *Id.* Over the nearly ten-year duration of the relationship, two outside attorneys for Baptist, Ruth Lehr, and later, Mark Thompson, both highly regarded health care experts, authored the written consulting contracts between Baptist and the LaHues. Appendix at 81a-82a.

In July 1998, a superseding indictment charged Anderson, Lehr, Thompson, the LaHues and two other Baptist executives, Dennis McClatchey and Ronald Keel, with conspiracy and substantive violations of the Anti-kickback Statute. Appendix at 51a. It alleged they conspired to violate the statute through the solicitation and receipt of inducements in exchange for the referral of nursing home patients to Baptist. These inducements were allegedly masked by "sham" consulting agreements purportedly created by the attorneys to hide the solicitation and payment of illegal remunerations. Appendix at 52a. Anderson and the other defendants denied these charges, and presented evidence that the consulting agreements were legitimate and that the overall relationship benefitted patients and reduced Medicare-covered costs.

The trial lasted nine weeks. At the close of the government's case, the court acquitted attorneys Lehr and

Thompson, finding no evidence of criminal intent in authoring the consulting agreements. In doing so, the district court noted the confused history of interpretations of the Anti-kickback Statute, including "reversals of field by the [HHS] OIG concerning its own interpretation" of the Act, and the absence of any decisions of the Supreme Court, or the Eighth or Tenth Circuit Courts of Appeal, to guide Lehr and Thompson in fashioning the agreements. Appendix at 53a, 81a-82a. The court then permitted the case to go to the jury, which found Anderson, McClatchey and the LaHues guilty, and acquitted Keel on statute of limitations grounds. Appendix at 53a. The district court later granted McClatchey a judgment of acquittal and/or a new trial which was reversed by the Tenth Circuit on an appeal by the government. *See United States v. McClatchey*, 217 F.3d 823 (10th Cir.), *cert. denied*, 121 S. Ct. 574 (2000).

Notwithstanding its findings that there was no evidence that Medicare patients received substandard care, no evidence that patient choice was affected, no evidence of unnecessary services, and substantial evidence that Baptist became a premier provider of gerontology services, the district court denied Anderson's post-trial motion for judgment of acquittal. Appendix at 49a, 56a-57a.

Prior to sentencing, the district court issued a written order imposing, at the government's request, a four-point enhancement for Anderson under U.S.S.G. § 3B1.1(a), for his role as an "organizer" or "leader" of the alleged criminal activity in the case. Appendix at 143a-145a. At sentencing, it determined Anderson's base offense level at 8, under the commercial bribery guidelines in U.S.S.G.

§ 2B4.1. *Id.* The court then found the value of the bribes paid by Baptist was more than $800,000, but less than $1,500,000, and imposed an 11-point enhancement, under U.S.S.G. § 2F1.1, for a total offense level of 23. *Id.* As Anderson had no prior criminal history, his criminal history category was I, which called for a sentence of imprisonment of 46 to 57 months. *Id.* The court imposed a sentence of 51 months imprisonment on Counts 1 and 3, to be served concurrently, and fined him $75,000. *Id.* The court granted Anderson bond pending appeal, finding substantial issues existed on appeal, which if found to exist by the Tenth Circuit, would mandate acquittal and/or a new trial. *Id.*

While Anderson's appeal was pending, the Tenth Circuit granted the motion of six national and regional medical and hospital associations to appear as amicus curiae in support of Anderson's arguments that the district court's "at least in part" instruction incorrectly instructed the jury on the elements of a violation of the Anti-kickback Statute. While his appeal was being briefed, however, the Tenth Circuit granted the government's appeal of McClatchey's post-verdict acquittal and reinstated McClatchey's conviction. 217 F.3d at 835. In that opinion, decided before Anderson's appeal was at issue, the Tenth Circuit also reached the question of whether the jury instruction correctly stated the law (based upon virtually no briefing and no oral argument) and held that the instruction was correct.

In Anderson's appeal, the Tenth Circuit then found that Anderson's arguments were foreclosed by the decision of the prior panel in *McClatchey* and affirmed his conviction on June 18, 2001. Appendix at 20a-21a.

Anderson filed a timely petition for rehearing by the panel and for rehearing *en banc*. The Court of Appeals also granted Anderson leave to file a supplemental brief challenging his sentence under the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000) and permitted the government to file a response, which it did. Appendix at 130a-131a.

On August 17, 2001, the Tenth Circuit denied Anderson's petitions for panel rehearing and for rehearing *en banc*, and in conjunction therewith, entered a revised opinion. *See United States v. LaHue*, 261 F.3d 993 (10th Cir. 2001). The revised panel opinion did not alter the court's opinion on the Anti-kickback Statute, and it is entirely silent concerning Anderson's challenge to his sentence under *Apprendi* raised in his supplemental brief. *Id.*

On August 24, 2001, Anderson filed a Motion to Stay the Mandate in the Tenth Circuit, noting that the Tenth Circuit had yet to issue an express ruling on the *Apprendi* issue. The Tenth Circuit denied Anderson's Motion to Stay the Mandate, and concurrently issued its mandate in this case, on August 29, 2001, making no ruling on the *Apprendi* issues Anderson had been granted leave to raise. Appendix at 132a-133a. Anderson then filed a Motion to Recall the Mandate in the Tenth Circuit, asking the Circuit to recall for the purpose of ruling on the *Apprendi* issue raised in the Supplemental Brief. On October 25, 2001, the Tenth Circuit summarily denied that motion, without comment. Appendix at 134a.

The district court subsequently continued Anderson's bond pending his petition for writ of certiorari to

this Court, finding the continued existence of substantial issues on appeal.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI IS REQUIRED SO THAT THIS COURT MAY DETERMINE WHETHER A JURY INSTRUCTION UNDER THE ANTI-KICKBACK STATUTE INSTRUCTING THE JURY UNDER A "ONE PURPOSE TEST" REPRESENTS AN IMPROPERLY BROAD CONSTRUCTION OF THE STATUTE THAT EFFECTIVELY CRIMINALIZES INNOCENT CONDUCT.

Under the Anti-kickback Statute, Petitioner could be convicted if he "knowingly and willfully offer[ed] or pa[id] any remuneration (including any kickback, bribe, or rebate) directly or indirectly, in cash or in kind to any person to induce such person . . . to refer" patients covered by Medicare, Medicaid, or another Federal health care program. In the decision below, the United States Court of Appeals for the Tenth Circuit affirmed a jury instruction (reproduced in full below) that allowed Petitioner to be convicted upon a showing that the hospital's payments to the physicians for services were subjectively intended by the hospital administrators, "at least in part," to induce patient referrals. Under this instruction, Petitioner could escape criminal conviction only if his mind was "wholly" free of any intent to induce such referrals. The instruction effectively added words to the statute, as the Anti-kickback Statute nowhere states or implies such an "at least in part" standard.

The district court, in explaining the basis for this broad instruction, recognized this Court's decision in *United States v. Sun-Diamond Growers*, 526 U.S. 398, 412 (1999), that "a [criminal] statute in [a complex regulatory environment] that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter," but held that the Anti-kickback Statute "is simply a meat axe." Appendix at 108a, n. 25. The district court further specifically found that the hospital-physician relationship at issue here was beneficial to patients and Medicare alike, and caused none of the evils that the Anti-kickback Statute was designed to prevent. Appendix at 56a-57a. Yet, the court held that it simply had no choice but to find Petitioner committed a crime under the "meat-axe" construction. Appendix at 107a-108a. The Tenth Circuit agreed. Appendix at 22a.

If allowed to stand, this interpretation will have the effect of criminalizing a broad range of legitimate, innovative, and beneficial arrangements between hospitals and physicians, such as the model geriatric health care clinic and program established by Petitioner's hospital in this instance. If the prospect of patient referrals even crosses the hospital executive's mind – as will almost always be the case because hospitals are in the business of attracting and serving patients – the contract is unlawful under the Tenth Circuit's reading of the statute. This interpretation far exceeds what Congress intended, as the statutory history demonstrates. It is also directly at odds with well-settled principles of statutory construction, including this Court's mandate that a criminal statute should not be interpreted broadly, to criminalize apparently innocuous behavior, when another interpretation is

available. *See, e.g., Sun Diamond, supra; United States v. X-Citement Video, Inc.*, 513 U.S. 64, 71-72 (1994). Indeed, the Tenth Circuit's interpretation raises grave constitutional questions, as it would potentially criminalize virtually all contractual arrangements among health care providers, thereby ceding authority to government functionaries to decide who has "violated" the statute. *See, e.g., City of Chicago v. Morales*, 527 U.S. at 60-61 (1999); *Jones v. United States*, 529 U.S. 848, 857-58 (2000).

This Court has never addressed the proper interpretation of the Anti-kickback Statute, a criminal statute that concerns every segment of the health care industry. As discussed below, the decisions of the several Courts of Appeal that have considered the statute have not been uniform, but the Tenth Circuit is now the third Circuit to have adopted some version of the "one purpose" test – *i.e.*, holding that a crime is committed if any purpose (however insignificant) of an arrangement is to induce covered patient referrals. Unless this Court grants review, the health care industry will have no choice but to attempt to govern itself under the all-encompassing terms of the "one purpose" standard. The statutory interpretation issue is squarely presented here, and a sufficient number of Circuits have spoken on this issue that further enlightenment is unlikely to result from awaiting a subsequent case.

A. The Tenth Circuit's Interpretation Threatens to Criminalize a Vast Array of Legitimate and Beneficial Arrangements in the Health Care Industry.

At the close of all the evidence, the district court, over objections, instructed the jury as follows:

> In order to sustain its burden of proof against the hospital executives for the crime of violating the Anti-kickback statute, the government must prove beyond a reasonable doubt that the defendant under consideration offered or paid remuneration with the specific criminal intent to 'induce' referrals. To offer or pay remuneration to induce referrals means to offer or pay remuneration with intent to gain influence over the reason or judgment of a person making referral decisions. The intent to gain such influence must, at least in part, have been the reason the remuneration was offered or paid.
>
> On the other hand, defendants Anderson, Keel and McClatchey cannot be convicted merely because they hoped or expected or believed that referrals may ensue from remuneration that was designed wholly for other purposes. Likewise, mere oral encouragement to refer patients or the mere creation of an attractive place to which patients can be referred does not violate the law. There must be an offer or payment of remuneration to induce, as I have just defined it.

Appendix at 93a-94a.

Thus, the jury was instructed that it must convict Anderson if it found that the fees paid by Baptist to the LaHues were intended, "at least in part," to "induce" the doctors to refer Medicare-covered patients and that

Anderson should be acquitted only if the fees were paid "wholly for other purposes" than to obtain referrals.

This extremely expansive interpretation of the Anti-kickback Statute derives from a much-criticized decision of the Third Circuit, *United States v. Greber*, 760 F.2d 68 (3d Cir. 1985), which held that a crime is committed even if "one purpose" of a remuneration is to induce referrals, without regard to what may be the primary or motivating purpose of the remuneration. *Id.* at 71.

While the Anti-kickback Statute is aimed at deterring specific abusive practices, if applied literally, the statute is so broad that it would prohibit a host of beneficial and important programs that present no such concerns. This problem is particularly acute in the hospital context. Under the Tenth Circuit's interpretation, every hospital would violate the statute on a daily basis through normal business activities, such as policies pertaining to staff privileges, appointments, or physician status, which result in both benefits to physicians and referrals to hospitals. Commentators have widely recognized that a broad reading of the statute also stifles innovation by criminalizing many beneficial programs that improve efficiency, patient care, and other arrangements which are otherwise natural, legitimate, and beneficial responses to the constant changes in health care. *See* William R. Kucera, *Hanlester Network v. Shalala: A Model Approach to the Medicare and Medicaid Kickback Problem*, 91 Nw. U. L. Rev. 413, 446 (1996); *see also* Blumstein, *The Fraud and Abuse Statute in an Evolving Health Care Marketplace: Life in the Health Care Speakeasy*, 22 Am. J. Law & Medicine 205,

213 (1996) (describing the chilling effect of broad interpretation of the statute would have on ordinary business practices).

The Tenth Circuit's instruction places an impossible burden on health care providers and incorrectly states Congressional intent. Hospitals are in the business to care for patients and, therefore, virtually everything a hospital administrator does has as one purpose the goal of attracting patients to the hospital. Under the Anti-kickback Statute, payment for services should not be illegal, even if patient referrals may result. That "one purpose" cannot make every benefit conferred by a hospital to a potential referral source, such as a physician, a crime.

B. The Tenth Circuit's Interpretation Violates Fundamental Principles of Statutory Construction.

Petitioner argued to the district court that a "one purpose test" impermissibly expanded the scope of the statute beyond the intent of Congress, and that the jury should have been instructed that it could convict only if it found that inducing referrals was the primary purpose of the remuneration paid. Anderson raised these arguments as a means of limiting the statute to its intended scope, rather than the overly broad construction implicit in a "one purpose test." He also suggested the jury be instructed on the statutory language only, without reference to "one purpose" or similar language. The district court rejected these arguments, not because it disagreed with Anderson's conclusion that many beneficial arrangements would be rendered criminal under a "one purpose test," but because the court concluded the language of the

statute left no choice but to adopt the broadest possible construction. Appendix at 108a.

The district court also rejected the logic of this Court expressed in *Sun-Diamond,* 526 U.S. at 406-12, on this point, opining that the statute "is simply a meat axe." *Id.* at n. 25. The statute is not a "meat axe," or at least should not be interpreted as such. Rather, it provides only that one who "knowingly and willfully offers or pays any remuneration . . . to any person to induce such person" to refer covered patients for services is guilty of a felony. 42 U.S.C. § 1320a-7b(b)(2). The statute is silent on the legality of a "mixed-purpose" remuneration, *i.e.*, that which is offered to pay for multiple purposes. The "at least in part" test adopted by the Tenth Circuit thus *added* to the statute a prohibition against *all* such "mixed-purpose" remuneration, no matter how insignificant the referrals may be to the transaction or no matter how beneficial the resulting medical relationship. This instruction is incorrect and dangerously broad. It converts a criminal statute passed with a specific aim – to deter and punish abusive practices that threaten the integrity of federally funded health care programs – into a prohibition of *all* arrangements that implicate patient referrals. The "in part" language sweeps in virtually any arrangement between a hospital and a physician, no matter what the principal goals or effects of that arrangement may be, purely on the basis of the participants' subjective desires. If the prospect of patient referrals even crosses a hospital executive's mind, as will almost always be the case because hospitals are in the business of attracting and serving patients, the contract in question is unlawful under the jury instruction and legal standard adopted by the Tenth Circuit.

Basic principles of statutory construction require the narrowest reading of the Anti-kickback Statute that is consistent with its language and purpose. Rather than a "one purpose" test, a "primary purpose" interpretation comports better with the traditional principles of statutory construction as articulated by this Court.

This Court has consistently refused to interpret criminal statutes broadly when another interpretation is available. *See, e.g., X-Citement Video,* 513 U.S. at 71-72; *Sun-Diamond,* 42 U.S. at 406-12 (particularly important for statutes under a complex regulatory framework). When the Tenth Circuit adopted the district court's instruction that Anderson could be convicted if any part of his intent was to obtain referrals, it "turn[ed] the normal construction of criminal statutes upside down, replacing the doctrine of lenity with a doctrine of severity." *Crandon v. United States,* 494 U.S. 152, 178 (1990) (Scalia, J., concurring). By adopting an instruction inserting the "one purpose test" into the Anti-kickback Statute, the Tenth Circuit has violated this most basic rule of statutory interpretation and immeasurably broadened the scope of that criminal statute. Nowhere do the words "one purpose" or "at least in part" or "wholly" any similar phrase appear in the statute; certainly, nothing in its text suggests that if any small part of a defendant's intent is to obtain referrals, he is guilty notwithstanding other countervailing motivations or benefits.

In determining a statute's proper interpretation, moreover, the "purpose of Congress is the ultimate touchstone." *Gade v. National Solid Wastes Mgt. Ass'n,* 505 U.S. 88, 96 (1992). As discussed further below, in the years

since the statute was first passed, and following the *Greber* decision, Congress has repeatedly sought ways to narrow the reach of the statute and observed that the Anti-kickback Statute was not designed to punish legitimate, normal business practices. *See, e.g.*, 54 Fed. Reg. 3088 (January 23, 1989). A statute should not be read literally to cover activities Congress did not intend to regulate. *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 453 (1989).

C. The Tenth Circuit's Interpretation Ignores the Statutory and Regulatory Context and History of the Anti-kickback Statute.

The Anti-kickback Statute was intended to prevent fraud and abuse in the provision of health care services under Medicare, Medicaid, and other federally funded health care programs. Its purpose is to prohibit arrangements that lead to overutilization of federally funded services, impair a patient's ability to choose among providers, restrict competition, and decrease the quality of patient care. *See* Statements of Office of Inspector General, Department of Health and Human Services, 63 Fed. Reg. 1659, 1662 (January 9, 1998). However, the Tenth Circuit's opinion criminalizes a wide range of activities that pose none of these dangers, and which are intended to be lawful.

The statute was originally passed in 1972 and amended twice, first in 1977 in response to widespread criticism that it did not clearly delineate illegal conduct (Pub. L. No. 95-142, § 4, 91 Stat. 117, 1181 (1977)), codified at 42 U.S.C. § 1395nn(b) and § 1396h(b) (1977), and again

in 1980 by adding that prohibited conduct must be performed "knowingly and willfully." (Pub. L. No. 96-499, Title IX, § 917, 94 Stat. 2625 (1980)), codified at 42 U.S.C. § 1395nn(b) and § 1396h(b) (1980). In 1987, Congress recodified the separate Medicare and Medicaid prohibitions under a single provision, 42 U.S.C. § 1320a-7b(b). At the same time, it directed HHS to promulgate "safe harbor" regulations identifying specific conduct or transactions that would not be subject to prosecution, in response to widespread concerns among legislators and health care providers, fostered by the 1985 *Greber* ruling, that the language of the statute, if otherwise read literally, was so broad that "many relatively innocuous, or even beneficial, commercial arrangements are technically covered by the statute and are, therefore, subject to criminal prosecution." *See* 54 Fed. Reg. 3088 (January 23, 1989); H. Rep. No. 100-85, at 27 (May 7, 1987); S. Rep. No. 100-109, at 27 (July 14, 1987). In publishing proposed and final "safe harbor" regulations in 1989 and 1991, HHS recognized that the need for safe harbors stemmed from the overly broad interpretation of the statute found in *Greber*. 54 Fed. Reg. 3088 (January 23, 1989). While the safe harbors carve out certain specific arrangements as *per se* lawful, they do not interpret the scope of the statute with regard to arguments falling outside a safe harbor.

As late as 1996, in its continuing effort to "clarify" an overbroad statute, Congress enacted a provision requiring the HHS Office of Inspector General ("OIG") to issue binding advisory opinions to health care providers seeking guidance on interpretation of the law. Pub. L. No. 104-91, Title II, § 205, 110 Stat. 1936 (August 21, 1996). The House committee observed that the reason for this new

requirement was continuing confusion as to the scope of the statute:

> Little or no guidance is currently provided because there are no regulations and only insufficient safe harbors. Without this ability, a chilling effect is placed on legitimate arrangements, particularly when providers are attempting to structure new and innovative health care delivery systems to contain health care cost.

H. Rep. No. 104-496, at 84 (1996).

Congress and the regulators have repeatedly recognized, therefore, that the Anti-kickback Statute should not be viewed as a "meat-axe" that could chill legitimate business activity. A proper statutory interpretation should focus on harms the statute seeks to prevent.

D. The Decisions of the Courts of Appeals and District Courts are in Disarray, and this Court's Guidance is Needed to Prevent Confusion in the Health Care Industry and Avoid a Severe Chilling Effect.

Prior to *Greber*, in 1985, no federal circuit had ruled on the issue of whether remuneration was unlawful if an intent to obtain referrals was one of several purposes of the remuneration – if a payment was in part motivated by valuable services provided by a physician, but also resulted in the return of covered referrals. *Greber* held that a fee payment from a laboratory to a physician was unlawful if "one purpose" of the fee was to induce referrals, even if there were other accompanying considerations. That case involved an obviously illicit kickback arrangement where a lab owner paid a flat percentage of

test fees in exchange for patient referrals. The Third Circuit upheld a jury instruction permitting conviction if a portion of the payment was for legitimate consulting services, as long as "a purpose" of the remuneration was to induce referrals. 760 F.2d at 71.

The *Greber* decision was heavily criticized in the health care community. Indeed, even after the *Greber* decision, OIG Counsel advised in a letter opinion that remuneration "will raise serious questions" only if "as was the case in *Greber*, the payments, although justified on a basis of services rendered by the individuals, appear intended primarily to induce referrals." *See* Yampolsky letter of November 25, 1985, Appendix at 156a-157a.

From 1985 through 1989, no other appellate courts considered the "mixed purpose" question decided in *Greber*. Since then, when courts have addressed it, the results have not been uniform. While the Ninth Circuit generally followed *Greber's* reasoning in *United States v. Kats*, 871 F.2d 105, 108 (9th Cir. 1989), the First Circuit declined to reach the *Greber* issue, holding only that a district court's instruction that the statute was violated if the primary purpose was to induce referrals did not understate the government's burden of proof. *United States v. Bay State Ambulance & Hosp. Rental Srv.*, 874 F.2d 20, 30 (1st Cir. 1989). Several district courts in other circuits have declined to follow *Greber*. *See, e.g.*, Jury Instruction N in *United States v. Jain*, Nos. 94-00087-01, 94-00087-02-CR-W-6 (W.D. Mo. 1995), *conviction aff'd in part and rev. in part on other grounds*, 93 F.3d 436 (8th Cir. 1996) (Appendix at 158a); Jury Instructions in *United States v. Siegel*, 94-156-CR-T-23C, at 26 (M.D. Fla. 1996), *aff'd in part and rev. in*

part on other grounds, United States v. Stark, 157 F.3d 833, 837-38 (11th Cir. 1998).

The Tenth Circuit's opinion is also in tension with the decision of at least one other court of appeal. In *Hanlester Network v. Shalala*, 51 F.3d 1390, 1398-99 (9th Cir. 1995), the Ninth Circuit held that participants in a health care joint venture had not violated the statute, even though the arrangement at issue was intended to encourage its limited partners to refer patients, and even though potential partners were told that the venture's success depended upon such referrals. *Hanlester* sets forth an objective standard under which defendant's conduct may be judged without the necessity for an inquiry into his subjective desires. Under the "one purpose" test adopted by the Tenth Circuit, however, health care providers and others in the industry will be convicted of a crime if any part of their intent in paying a remuneration was to obtain referrals. Thus, the Tenth Circuit's decision approves an instruction that, if anything, has increased the problematic subjectivity inherent in the *Greber* standard.

E. The Tenth Circuit's Interpretation Implicates Grave Constitutional Questions, Which May Be Avoided by a Narrower Construction of the Statute.

At the very bedrock of our polity rests the principle that no conduct is unlawful unless specifically prohibited by a duly enacted law. *See, e.g., Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966). The Tenth Circuit's interpretation of the Anti-kickback Statute, however, turns this most

basic axiom on its head. As discussed above, the "one purpose," or "at least in part," test makes virtually every arrangement between a hospital and a physician unlawful, because the hospital executive will always have patient referrals in mind, at least to some degree. *See, e.g.*, David M. Frankford, *Creating and Dividing the Fruits of Collective Economic Activity: Referrals Among Health Care Providers*, 89 Colum. L. Rev. 1861, 1909 (1989). Though Congress has long recognized this problem, it has elected not to amend the statutory language but instead has sought unsuccessfully to mitigate the statute's overbreadth by delegating authority to HHS to carve out exceptions to the statute through narrowly defined safe harbors, and to grant special dispensation for particular programs through the advisory opinion process.

The result is that if the Tenth Circuit's interpretation is the law, every hospital-physician arrangement is unlawful, *unless* it falls within one of the narrow regulatory "safe harbors," or *unless* the participants seek and obtain an Advisory Opinion from HHS blessing their arrangement, a procedure not available to Petitioner during virtually all of the period at issue below. In other words, in the hospital-physician context at least, the world according to the Tenth Circuit is topsy-turvy: *all conduct is illegal* unless the agency has expressly, or through an "advisory" dispensation, made a specific act legal.

Such ad hoc lawmaking with prosecutors and agency personnel who are free to prosecute with unfettered power offends the Due Process Clause. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165 (1972). This Court has repeatedly held that a statute violates Due Process if it

provides unfettered discretion to government officials to decide what is legal and what is illegal and has forbidden statutes which improperly delegate basic policy matters to be applied in a subjective and ad hoc manner. *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983); *Smith v. Goguen*, 415 U.S. 566, 574-75 (1974).

Numerous times over the years, this Court has applied this reasoning to strike down, as unconstitutional under the Due Process Clause, various laws that insufficiently limited the arbitrary discretion of government officials. *See, e.g., Morales*, 527 U.S. at 61; *see also Kolender*, 461 U.S. at 357-61 (1983); *Goguen*, 415 U.S. at 574-76; *City of Jacksonville*, 405 U.S. at 162-71; *Coates v. City of Cincinnati*, 402 U.S. 611, 614-16 (1971); *Giaccio*, 382 U.S. at 402-03.

This crucial prohibition against placing undue discretion in the hands of bureaucrats and prosecutors not only invalidates mean-spirited or discriminatory enactments, but applies equally to well-intentioned laws (such as the Anti-kickback Statute). *See, e.g., Morales*, 119 S. Ct. at 1856-57. Whatever their purpose, laws vesting undue discretion in government officials may easily be abused. *See, e.g., Baggett v. Bullitt*, 377 U.S. 360, 373 (1964).

In this case, under the limitless "one purpose" test, prosecutors and agency officials may choose to proceed criminally against virtually anyone in the health care community whom they desire to subject to prosecution. *See* Stephen C. Pierce, *United States v. Greber and Its Effect on the Medicare and Medicaid Programs*, 75 Ky. L.J. 677, 696-98 (1986-87). HHS itself plainly recognizes that the Anti-kickback Statute, even as "limited" by safe harbors,

criminalizes far more conduct than the government has any intention of prosecuting. The agency's Advisory Opinions regularly "forgive" or "exempt" ostensibly illegal arrangements. In practice, therefore, this statute suffers from precisely the vice about which this Court has consistently warned: it is enforced "on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application," *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972), permitting agency officials and prosecutors to "pursue their personal predilections," *Goguen*, 415 U.S. at 574-75.

This constitutional infirmity in the statute need not be confronted, however, if this Court adopts a narrower construction than the Tenth Circuit. *See Jones*, 529 U.S. at 857-58, *DeBartolo Corp. v. Florida Gulf Coast Building & Constr.*, 485 U.S. 568, 575 (1988) (court should construe statute to avoid serious constitutional problems). This Court should grant certiorari to prevent the unconstitutional misreading of a federal criminal statute.

II. CERTIORARI SHOULD BE GRANTED SO THAT THIS COURT CAN PRECISELY DEFINE THE CONTOURS OF THE CONSTITUTIONAL PRINCIPLES UNDERLYING ITS HOLDING IN *APPRENDI v. NEW JERSEY*, AND THEIR IMPACT ON SENTENCING PRACTICES UNDER THE UNITED STATES SENTENCING GUIDELINES.

Petitioner seeks certiorari review to resolve an important issue of federal law that was expressly reserved by this Court in *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000): the effect of the reasoning underlying

Apprendi on the "determinate sentencing scheme" provided in the United States Sentencing Guidelines. *Id.* at 2366, n.21. For the reasons set forth below, the Court should grant review in order to address this important question of federal law, that has not been, but should be, settled by the Court. Alternatively, this Court should exercise its supervisory authority, under Rule 10(c), to grant certiorari to correct the Tenth Circuit's failure to rule on Anderson's *Apprendi* arguments raised in his supplemental brief.

The literal holding of *Apprendi* is that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 120 S. Ct. at 2362-63. In accordance with this holding, the majority of circuit courts have held that *Apprendi* does not extend to sentencing guideline factors where factors increase a defendant's guideline range, but not the statutory maximum. *See, e.g., United States v. Sullivan*, 255 F.3d 1256, 1265 (10th Cir. 2001); *United States v. Hernandez-Guardado*, 228 F.3d 1017 (9th Cir. 2000); *United States v. Corrado*, 227 F.3d 528 (6th Cir. 2000); *United States v. Meshack*, 225 F.3d 556 (5th Cir. 2000); *United States v. Aguayo-Delgado*, 220 F.3d 926 (8th Cir. 2000).

But, in the principal dissent in *Apprendi*, Justice O'Connor noted that one interpretation of the underlying constitutional principles upon which the holding was based is that the Constitution "requires that a fact be submitted to a jury and proved beyond a reasonable doubt if it, as a formal matter, increases the range of

punishment beyond that which could legally be imposed absent that fact." *Id.* at 2390 (O'Connor, J., dissenting).

Thus, to focus on the narrow language of the literal holding of *Apprendi* is overly formalistic, and gives no regard to the breadth of the underlying principles espoused in *Apprendi*. *Apprendi's* holding gives substance to a principle that the Court concluded had its foundation in centuries of common law:

> The historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.

Apprendi, 120 S. Ct. at 2359.

The Court derived this conclusion after discussing at length the importance, at common law, of submitting criminal proceedings to a jury "after being initiated by an indictment containing 'all the facts and circumstances which constitute the offence, . . . [so] that the defendant . . . may be enabled to determine the species of offence they constitute, in order . . . that there may be no doubt as to the judgment which should be given, if the defendant be convicted.' " *Id.* at 2356. The Court also noted that "[t]he defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime." *Id.* These underlying principles – coupled

with the majority's characterization of the "relevant inquiry" to be "does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict," *id.* at 2348 – form the basis for Justice O'Connor's conclusion that *Apprendi* can be read to "require that a fact be submitted to a jury and proved beyond a reasonable doubt if it, as a formal matter, increases the range of punishment beyond that which could legally be imposed absent that fact." *Id.* at 2390 (O'Connor, J., dissenting).

It is precisely these principles that the various circuit courts have failed to preserve in holding that *Apprendi* has no impact on increases in sentencing ranges under the United States Sentencing Guidelines. These rulings rest upon the mistaken notion that a defendant, when charged by indictment with a particular set of facts allegedly constituting an offense, has an "ability to predict with certainty the judgment from the face of the felony indictment," simply by reference to the maximum sentence of imprisonment provided by the statute setting forth the "elements" of the offense. This is not so. In reality, under the federal system, the Sentencing Guidelines themselves, rather than the statutory offense of conviction, provide the "invariable linkage of punishment with crime," as contemplated in *Apprendi*. As noted by Justice Scalia, "[w]hile the products of the Sentencing Commission's labors have been given the modest name 'Guidelines,' they have the force and effect of laws, prescribing the sentences criminal defendants are to receive. A judge who disregards them will be reversed." *Mistretta*

v. United States, 488 U.S. 361, 413 (1986) (Scalia, J., dissenting) (citations omitted). Thus, "[f]rom a defendant's perspective, the legislature's decision to cap the possible range of punishment at a statutorily prescribed 'maximum' would affect the actual sentence imposed no differently than a sentencing commission's (or a sentencing judge's) similar determination." *Apprendi*, 120 S. Ct. at 2401 (Breyer, J., dissenting).

Accordingly, although substantive criminal statutes set the maximum possible sentence for a crime, the Sentencing Guidelines themselves *in fact* apprise the defendant of the actual range of sentencing – delineating both the minimum and the maximum sentence – within which the trial court must impose a sentence *solely upon facts charged in the indictment and found by the jury beyond a reasonable doubt. See United States v. Watts*, 519 U.S. 148, 166 (1997) (Stevens, J., dissenting). *See also United States v. Kinter*, 235 F.3d 192, 200 (4th Cir. 2000); *United States v. Norris*, 128 F. Supp. 2d 739, 742 (E.D.N.Y. 2001). Any increase in this sentencing range necessarily requires, under the Guidelines, further findings by the judge of facts neither charged in the indictment, nor proven to a jury beyond a reasonable doubt. A defendant cannot be said to have "notice" of these additional facts or their attendant consequences from the indictment, and therefore cannot be said to have "no doubt as to the judgment which should be given, if [he] be convicted" upon consideration of an indictment not charging the additional facts. *Id.* at 2356. For these reasons, facts which supply a basis for sentence modifications under the "offense conduct" and "adjustment" provisions of the Guidelines must be

charged in the indictment, submitted to the jury, and proven beyond a reasonable doubt. *See Apprendi*, 120 S. Ct. at 2390-91 (O'Connor, J., dissenting). The Court should therefore grant *certiorari* in this case to settle this important question of federal law.

In this case, the relevant conduct considered by the district court in adjusting Anderson's base offense level upward merited the full constitutional protections set forth in *In re Winship*, 397 U.S. 358, 364 (1970), and reaffirmed in *Apprendi*, including charging the conduct in the indictment, and proof beyond a reasonable doubt of the conduct to the jury. *See Apprendi*, 120 S. Ct. at 2356. Under the base offense level of 8 underlying Anderson's crime of conviction, his Guideline sentencing range was 0-6 months, with an authorized sentence of probation. *See* U.S.S.G. § 5B1.1(a)(1). But, the district court – and not the jury – made findings that the value of the alleged bribes involved in this case was between $800,000 and $1,500,000, thereby meriting an 11-point increase under U.S.S.G. § 2F1.1. The court further found, based on facts not decided by the jury, that Anderson was an organizer or leader of a criminal activity that involved five or more participants, and accordingly imposed a four-point increase to Anderson's base score, pursuant to U.S.S.G. § 3B1.1. Thus, after the district court "determined" these facts, Anderson's offense level was raised to 23, requiring a sentencing range of 46-57 months, under which a probation sentence was unavailable. As such, the sentence imposed far exceeded that which he could have received had the court considered solely the facts charged in the

indictment and determined by the jury beyond a reasonable doubt. This increase of the maximum available sentence, without supporting facts found by the jury, runs afoul of the principles espoused in *Apprendi* and other recent precedents of this Court that uncharged facts which alter the range of sentencing available to the defendant must be submitted to the jury and proven beyond a reasonable doubt. *See Apprendi*, 120 S. Ct. at 2363.

CONCLUSION

This Court should grant Mr. Anderson's Petition for Writ of Certiorari and reverse the Order of the Court of Appeals.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROBERT C. LAHUE, Defendant-Appellant.	No. 99-3344
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DAN ANDERSON, Defendant-Appellant.	No. 99-3347
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RONALD H. LAHUE, Defendant-Appellant.	No. 99-3352

(Filed June 18, 2001)

THE AMERICAN HOSPITAL ASSOCIATION; FEDERATION OF AMERICAN HEALTH SYSTEMS; ASSOCIATION OF AMERICAN MEDICAL COLLEGES; AMERICAN OSTEOPATHIC ASSOCIATION; MISSOURI HOSPITAL ASSOCIATION; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,

Amici Curiae.

Appeal from the United States District Court for the District of Kansas (D.C. Nos. 98-CR-20030-03, 98-CR-20030-01, 98-CR-20030-04)

Tanya J. Treadway (Jackie N. Williams, United States Attorney, Topeka, Kansas; William H. Bowne, Department of Justice, Washington, D.C., with her on the brief), Assistant United States Attorney, Topeka, Kansas, for Plaintiff-Appellee.

Bruce C. Houdek of Bruce C. Houdek, P.C., Kansas City, Missouri, for Defendant-appellant Robert C. LaHue.

James R. Wyrsch (Keith E. Drill, Jacqueline A. Cook, and Cheryl A. Pilate with him on the briefs) of Wyrsch Hobbs Mirakian & Lee, P.C., Kansas City, Missouri, for Defendant-Appellant Dan Anderson.

Jeffrey D. Morris of Bryan Cave LLP, Overland Park, Kansas, for Defendant-Appellant Ronald H. LaHue.

Thomas S. Crane, Tracy A. Miner, Jeffrey D. Clements and Theresa M. Claffey, of Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., Boston, Massachusetts, filed an amici curiae brief for The American Hospital Association, Federation of American Health Systems, Association of American Medical Colleges, and American Osteopathic Association, Missouri Hospital Association.

Vicki Mandell-King, National Association of Criminal Defense Lawyers, Denver, Colorado; Barbara E. Bergman, National Association of Criminal Defense Lawyers, Albuquerque, New Mexico, Philip C. Zimmerman of Holme

Roberts & Owen LLP, Denver, Colorado, filed an amicus brief for National Association of Criminal Defense Lawyers.

Before **ANDERSON, BALDOCK** and **BRORBY**, Circuit Judges.

BRORBY, Circuit Judge.

Defendants Dan Anderson, Dr. Robert LaHue, and Dr. Ronald LaHue were convicted by a jury for violations of the Medicare Antikickback Act ("Act"), 42 U.S.C. § 1320a-7b(b), which criminalizes any remuneration knowingly and willfully offered, paid, solicited, or received in exchange for Medicare or Medicaid patient referrals, and violation of the conspiracy statute, 18 U.S.C. § 371. *See United States v. Anderson*, 85 F. Supp. 2d 1047, 1053 (D. Kan. 1999). In ruling on defendants' objections during trial and denying their motions for a new trial, the district court concluded: (1) the jury instructions on the Act correctly utilized the "at least in part" or "one purpose" standard; (2) Rule 801(d)(2)(E) of the Federal Rules of Evidence contemplates statements made pursuant to a lawful common plan, which justified the court's admission of over sixty documents under the rule; (3) two variances between the indictment and the evidence at trial did not prejudice defendants' right to a fair trial; and (4) it correctly denied defendants' request to provide judicial immunity to selected witnesses in light of this circuit's case law and no indication the government engaged in a deliberate attempt to distort the fact-

finding process. *See Anderson*, 85 F. Supp. at 1069-72, 1074-75, 1079-81. We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I. Background[1]

As a guide, the individuals discussed in this opinion can be broken down into three groups. First, osteopathic physicians Robert and Ronald LaHue ("the LaHues") served as the principals in Blue Valley Medical Group ("Blue Valley"), a specialized medical practice providing care to patients in nursing homes and other residential care facilities. *See McClatchey*, 217 F.3d at 826-27; *Anderson*, 85 F. Supp. 2d at 1052. Second, Baptist Medical Center ("Baptist"), a Kansas City, Missouri hospital, employed:

> Anderson, Dan (President, Chief Executive Officer)
> Eckard, Tom (Director of Geriatric Services)
> Flynn, Dixie (Director of Geriatric and Gerontology Services)
> Grim, Sarah (Director of Alternative Care Services)
> Grimes, Deborah (Director of Geriatric Services)
> Keel, Ronald (Vice President)

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[1] Because this case arises from jury verdicts against defendants, we view the evidence in the light most favorable to the prosecution. *See United States v. Woodlee*, 136 F.3d 1399, 1405 (10th Cir.), *cert. denied*, 525 U.S. 842 (1998). This section focuses on evidence applicable to Mr. Anderson and the Drs. LaHue and necessary to resolve their issues on appeal. We refer the reader to two of the published post-trial opinions in this case for a comprehensive review of the evidence. *See Anderson*, 85 F. Supp. 2d 1047; *see also United States v. McClatchey*, 217 F.3d 823 (10th Cir.), *cert. denied*, 121 S.Ct. 574 (2000).

McClatchey, Dennis (Senior Vice President, Chief Operating Officer)
McGrath, Kevin (Vice President)
Probst, Gerard (Chief Financial Officer)

See McClatchey, 217 F.3d at 827; *Anderson*, 85 F. Supp. 2d at 1052, 1054-57. Third, attorneys Ruth Lehr and Mark Thompson represented Baptist at various times during the course of the alleged conspiracy. *See McClatchey*, 217 F.3d at 827-28; *Anderson*, 85 F. Supp. 2d at 1052.

In the early 1980s, the LaHues were part-time faculty members at University Hospital, where they referred, admitted, and treated their patients. *See Anderson*, 85 F. Supp. 2d at 1053. In 1984, the LaHues sought an increase in salary from University Hospital in return for their continued patient referrals, in light of a competing offer from Baptist for $120,000 to $140,000 per year for the same patient referrals. *See id.* at 1054. University Hospital declined their request. *See id.*

In 1985, Baptist entered into a contract ("1985 contract") with the LaHues making them "Co-Directors of Gerontology Services." *McClatchey*, 217 F.3d at 827; *see Anderson*, 85 F. Supp. 2d at 1054. By this time, the LaHues had approximately 3,500 patients in the Kansas City metropolitan area and a correlatively large number of hospital referrals. *See Anderson*, 85 F. Supp. 2d at 1054-55. Mr. Probst testified the negotiations were "backwards" – establishing the fee first and only then agreeing to the services the LaHues would provide in return – and, from his and Messrs. Anderson, McClatchey, and Keel's perspective, were grounded in the hospital receiving patient

referrals.[2] *McClatchey*, 217 F.3d at 827. Mr. Probst described the resulting arrangement as unlike any he had seen in twenty years, and one with "the highest request for an annual consulting fee that I had experienced or had been involved with."

The arrangement evolved into a consulting contract in 1986 between Baptist and the LaHues ("1986 agreement"). *See Anderson*, 85 F. Supp. 2d at 1055-56. The 1986 agreement stated Baptist "desires to obtain the professional services of the [LaHues] to assist it and its affiliate organizations in the development and maintenance of a comprehensive Geriatrics Program, including medical education of health care professionals, quality of care standards, and philosophical and promotional matters relating to the care of the aged." The LaHues' duties under the 1986 agreement included: (1) clinical instruction, training, and information to Baptist's professional staff, including the Adult Health Care Services Clinic ("Clinic"), Emergency Services, Social Services, the medical staff in general, and the hospital administration; (2) instruction and training to the family practice residents and medical students; (3) consultation relating to the development of geriatrics programs and the expansion and utilization of Baptist's services for the aged; and (4) assisting in the completion of applications or reviewing patient care data for grants and studies relating to the medical care and institutional treatment of the aged.

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[2] Mr. Probst testified for the government under a grant of statutory immunity. *See Anderson*, 85 F. Supp. 2d at 1054 n.3.

Pursuant to the 1985 contract and the 1986 agreement, Baptist paid $75,000 annually to each of the LaHues from 1985 to 1993, with the exception of 1990 when the LaHues each received $68,750. *See McClatchey*, 217 F.3d at 827 & n.2; *Anderson*, 85 F. Supp. 2d at 1054.[3] Mr. Anderson directed those payments. *See Anderson*, 85 F. Supp. 2d at 1054. When the payments began, Blue Valley referred massive numbers of patients to Baptist, with a corresponding halt in referrals to University Hospital. *See Anderson*, 85 F. Supp. 2d at 1062. Blue Valley referred 8-10% of Baptist's hospital admissions and over 90% of the out-patient volume in its Clinic, which made it Baptist's largest referral source.

Ms. Grim, Baptist's Director of Alternative Care Services from 1984 to 1985, testified that Mr. Anderson: (1) made it clear to her the Baptist Blue Valley relationship was a business deal in which Baptist would pay money to Blue Valley in return for patient referrals; and (2) told her he was very protective of the Baptist Blue Valley relationship, because, in her words, Baptist was "going to get patients. It was about occupancy." Ms. Grimes, Baptist's Director of Geriatric Services from approximately 1986 to 1988, testified she was not aware of the 1985 contract, which purportedly made the LaHues Co-Directors of Gerontology Services.

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[3] Baptist and the LaHues signed a new contract in April 1993, but Dr. Ronald LaHue terminated it in November 1993. *See McClatchey*, 217 F.3d at 827-28. "Two temporary agreements sustained the payments to the LaHues through June of 1984." *Id.* at 828.

In the summer of 1985, the LaHues approached Mr. Anderson for help in managing their practice. *See McClatchey*, 217 F.3d at 827; *Anderson*, 85 F. Supp. 2d at 1055, 1064. Mr. Anderson placed one of Baptist's employees, Thomas Eckard,[4] with Blue Valley soon thereafter, but kept him on the Baptist payroll. *See McClatchey*, 217 F.3d at 827; *Anderson*, 85 F. Supp. 2d at 1055. "Although [Mr.] Eckard's official title was Director of Geriatric Services for Baptist, [he] worked at [Blue Valley] and effectively acted as [Blue Valley]'s manager." *McClatchey*, 217 F.3d at 827.

Based on his discussions with Messrs. Anderson and McClatchey, and others, Mr. Eckard understood his primary job responsibility was to maintain Baptist's relationship with Blue Valley in order to ensure the continued flow of patients to the hospital. *See Anderson*, 85 F. Supp. 2d at 1055. Mr. Eckard remained on the Baptist payroll and worked at Blue Valley in this capacity for approximately eight years. *See id.*

Mr. Anderson and the Baptist management team were aware Blue Valley never compensated Baptist for Mr. Eckard's management services. Drawing on his thirty-two-year career in the health care industry, Mr. Anderson testified he was "not aware of any [situation] that's identical to what we had with Blue Valley Medical Group and Tom Eckard." Mr. McClatchey testified it was a one-of-a-kind relationship.

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[4] Mr. Eckard pled guilty to conspiracy to violate 18 U.S.C. § 666 and cooperated with the government. *See Anderson*, 85 F. Supp. 2d at 1055 n.4.

Mr. Eckard described the services provided by the LaHues pursuant to the 1985 contract as " 'minimal to none.' " *Anderson*, 85 F. Supp. 2d at 1056 n.6, 1062 (quoting Mr. Eckard's testimony). Indeed, with Mr. Anderson's approval, the relationship changed to a consulting agreement in 1986, because the LaHues did not perform their duties under the 1985 contract. *Id.* at 1056, 1065. However, this change did not significantly affect the amount of services the LaHues provided to Baptist. Numerous witnesses "testified that the LaHues performed very few actual services in return for the substantial annual sum they were paid." *Id.* at 1062.

For example, Mr. Eckard testified his observations over the eight and one-half years of the Baptist-Blue Valley relationship revealed the LaHues did not provide the enumerated services in the agreements on a routine basis. Specifically, Mr. Eckard testified the LaHues: (1) never operated the Clinic; (2) only went on rounds with the Clinic staff "four or five times"; (3) provided "very little" in-service medical education and training to Baptist personnel; (4) spent "very minimal" amounts of time meeting with Baptist emergency room personnel on issues other than patient care; (5) only met with the emergency room nurses "two or three times"; and (6) trained Baptist family practice residents just "a few times."

Ms. Grimes sent Mr. McClatchey the following memorandum on March 3, 1987:

> The [Blue Valley] contract, effective June 1, 1986, stipulated scheduled activities to be carried out through the year (see enclosed). As of this date only one activity, quarterly staff meetings, has

> been implemented. I feel that it is in Baptist Medical Center's best interest to promptly implement the activities as outlined in the contract.

See Anderson, 85 F. Supp. 2d at 1056.

Ms. Flynn, Baptist's Director of Geriatric and Gerontology Services from 1988 to 1990, had operational responsibility for the Clinic and met weekly with Mr. Anderson, who she characterized as "very knowledgeable" regarding the Clinic and its operation. She testified the LaHues did not provide her any administrative consulting regarding supervision, budgeting, policy and procedure development, or standard of care development for the Clinic. Further, all the clinical development work was performed by Ms. Flynn and others; the LaHues only made recommendations as to the types of clinics to be created.

Regarding the services listed in the 1986 agreement as those sought by Baptist from the LaHues, Ms. Flynn testified: (1) the LaHues did nothing to develop a comprehensive geriatrics program at Baptist; (2) she did not observe them providing any medical education to health care professionals; (3) they had "very limited" contact with the physicians who treated their patients at Baptist; and (4) did not contribute regarding quality of care issues. Turning to the LaHues' enumerated duties in the 1986 agreement, Ms. Flynn testified she neither observed nor knew of the LaHues: (1) providing appropriate clinical instruction and training to the professional staff at Baptist; (2) performing rounds with Baptist personnel; (3) providing instruction or training to the Baptist family practice residents; (4) developing geriatric programs or

expansion and utilization of Baptist services; and (5) developing grants or studies. Most importantly, none of the Baptist management team ever asked her whether the LaHues provided the required services. She also testified she would not have budgeted any money for the services the Clinic received from the LaHues. In summary, she stated: "I felt more like I was working for them rather than them being available to me," and, had she known about the $150,000 payments to the LaHues per year, she stated: "I would have been alarmed."

In late 1991/early 1992, Mr. McGrath[5] learned from Dr. Robert LaHue that he and Dr. Ronald LaHue were not performing some of the services listed in the 1986 agreement. *See McClatchey,* 217 F.3d at 828. Further, Mr. McGrath received documentation the LaHues provided consulting for only approximately two hours per week. *See id.* at 830. Mr. McGrath discussed this information with Messrs. Anderson, McClatchey and Thompson, and expressed his concern the two hours per week did not justify the fees Baptist was paying the LaHues. *See id.* at 828. Messrs. Anderson, McClatchey, and Thompson neither disputed the accuracy of nor told Mr. McGrath the LaHues were performing other services not reflected in this documentation.

Nonetheless, the payments from Baptist to the LaHues continued. During 1993 and 1994, when it appeared the relationship with the LaHues might soon end, "Mr. Anderson worked to develop a strategy to

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[5] Mr. McGrath testified for the government under a grant of statutory immunity. *See Anderson,* 85 F. Supp. 2d at 1057 n.9.

replace the [Blue Valley] patients but did nothing to replace the LaHues' consulting services."[6] *See Anderson*, 85 F. Supp. 2d at 1065. As stated by the district court in its ruling on the defendants' post-trial motions: "Mr. Anderson knew the payments he directed were more than fair market value for consulting services, that the services specified ultimately proved to be not entirely bona fide, and that the services specified were not sufficiently being performed." *Id.*

The LaHues and Baptist benefitted greatly from their relationship. The LaHues received over $1.8 million from Baptist as a result of the various contracts and Mr. Eckard's unreimbursed salary, and Baptist received over $39.5 million from Medicare for services rendered to Blue Valley's patients.

With Mr. Eckard's assistance, Blue Valley entered into similar arrangements or contracts with four other hospitals: (1) from 1991 to 1994, St. Joseph's Medical Center paid Blue Valley over $341,000 and received over $4.9 million from Medicare; (2) from 1990 to 1992, Deaconess Medical Center paid Blue Valley $125,000 and received over $2 million from Medicare; (3) from 1992 to 1994, Bethany Medical Center paid Blue Valley over $169,000

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[6] Mr. Anderson claims Baptist "entered into an agreement . . . with Drs. Leonard Hock and Cathy Weatherford to perform essentially the same services provided by the LaHues in prior consulting agreements." The record does not support this claim, because Dr. Weatherford (with Dr. Hock as backup) contracted to be the Clinic's Medical Director. This role was previously handled by Dr. Nevada Lee, and the efforts of Drs. Weatherford and Hock appear to have focused on primary patient care services in the Clinic.

and received over $3.5 million from Medicare; and (4) from 1992 to 1994, Alexian Brothers Hospital paid Blue Valley $190,000 and received over $5.6 million from Medicare. *See Anderson*, 85 F. Supp. 2d at 1060-61. Around 1992, Liberty Hospital refused the LaHues' offer to enter a similar arrangement or contract. *See id.* at 1061.

II. Procedural History

In pertinent part, the Act provides:

> (1) whoever knowingly and willfully solicits or receives any remuneration . . . directly or indirectly, overtly or covertly, in cash or in kind –
>
> (A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program . . .
>
> . . . .
>
> shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.
>
> (2) whoever knowingly and willfully offers or pays any remuneration . . . directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person –
>
> (A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program . . .

. . . .

> shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

42 U.S.C. § 1320a-7b(b). Baptist executives Mr. Anderson, Mr. McClatchey and Mr. Keel as well as attorneys Ms. Lehr and Mr. Thompson were each charged with one count of conspiracy to violate the Act with the LaHues and six other hospitals, and one substantive count of violating the Act. *See Anderson*, 85 F. Supp. 2d at 1052. The LaHues were each charged with one count of conspiracy to violate the Act with Baptist and six other hospitals, seven substantive counts of violating the Act, and a false claims conspiracy count in violation of 18 U.S.C. § 286. *See id.* Dr. Robert LaHue was also charged with threatening a witness in violation of 18 U.S.C. § 1512. *See id.*

At the close of the government's case, the district court: (1) granted the attorneys' motions for acquittal; (2) ruled the government failed to present sufficient evidence to demonstrate that any defendant but the LaHues participated in a conspiracy extending to the six other hospitals;[7] (3) severed the false claims and witness tampering counts as improperly joined pursuant to Fed. R. Crim. P. 8(b);[8] and (4) dismissed one of the substantive counts

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[7] Accordingly, the district court limited the jury's consideration of all evidence concerning the other hospitals to the charges against the LaHues.

[8] On the government's post-trial motion, the court dismissed the false claims count with prejudice and the witness tampering count without prejudice. (Doc. #415.)

against the LaHues on statute of limitations grounds. *See id.* at 1053.

On completion of a nine-week trial, the jury: (1) convicted Mr. Anderson on both charges; (2) convicted Mr. McClatchey on both charges; (3) acquitted Mr. Keel on the basis of his statute of limitations defense; (4) convicted Dr. Ronald LaHue of the conspiracy charge and four of the substantive charges of violating the Act; and (5) convicted Dr. Robert LaHue of the conspiracy charge and six of the substantive charges of violating the Act. *See id.* The district court granted Mr. McClatchey's motion for judgment of acquittal or, in the alternative, a new trial, and granted Dr. Ronald LaHue's motion for acquittal as to the substantive count charging him with a violation of the Act with regard to Alexian Brothers Hospital. *See id.* at 1051-52, 1061, 1063-68.

The district court: (1) sentenced Mr. Anderson to fifty-one months imprisonment, a $75,000 fine, a $100 special assessment, and three years supervised release; (2) sentenced Dr. Ronald LaHue to thirty-seven months imprisonment, a $25,000 fine, a $200 special assessment, and three years supervised release; and (3) sentenced Dr. Robert LaHue to seventy months imprisonment, a $75,000 fine, $142,040 restitution, a $350 special assessment, and three years supervised release.

There are four issues on appeal. All three defendants raise the following two issues: (1) whether the district court adopted an improperly broad construction of the Act, thereby erroneously instructing the jury under a "one purpose test" which effectively criminalized innocent conduct; and (2) whether the district court erred in

admitting numerous co-conspirator statements under a so-called "joint venture" theory, thereby violating Fed. R. Evid. 801(d)(2)(E) and defendants' constitutional right to confrontation. Mr. Anderson and Dr. Robert LaHue raise the third issue: (3) whether the district court erred in failing to grant a new trial based on prejudicial variances between the indictment and evidence at trial. Finally, the LaHues raise the fourth issue: (4) whether the district court abused its discretion by refusing to grant use immunity to twelve proposed defense witnesses who invoked the Fifth Amendment and refused to testify after the government identified them as unindicted co-conspirators in this case.

Before the government filed its consolidated brief in this appeal, another panel of this court published its opinion resolving the government's appeal of the district court's judgment of acquittal and the alternative grant of a new trial for Mr. McClatchey. *See McClatchey*, 217 F.3d at 826. This court reversed the district court's judgment and order, and remanded with instructions to reinstate the jury verdict against Mr. McClatchey. *See id.* at 836. This opinion is critical to our resolution of the first and third issues on appeal here, as we will detail in those sections of our discussion. *See infra* Part III.A, C.

III. Discussion

A. Jury Instruction on and Construction of the Act

Defendants[9] claim the applicable jury instructions on the Act – Instruction #32[10] for Mr. Anderson and

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[9] In this section, "defendants" refers to Mr. Anderson and the LaHues.

[10] In Instruction #32, the district court charged the jury as follows:

> In order to sustain its burden of proof against the hospital executives for the crime of violating the Anti-Kickback statute, the government must prove beyond a reasonable doubt that the defendant under consideration offered or paid remuneration with the specific criminal intent "to induce" referrals. To offer or pay remuneration to induce referrals means to offer or pay remuneration with intent to gain influence over the reason or judgment of a person making referral decisions. The intent to gain such influence must, *at least in part,* have been the reason the remuneration was offered or paid.
>
> On the other hand, defendants Anderson, Keel, and McClatchey cannot be convicted merely because they hoped or expected or believed that referrals may ensue from remuneration that was designed wholly for other purposes. Likewise, mere oral encouragement to refer patients or the mere creation of an attractive place to which patients can be referred does not violate the law. There must be an offer or payment of remuneration to induce, as I have just defined it.

(Emphasis added.)

Instruction #33[11] for the LaHues – are incorrect and warrant a new trial. Specifically, they challenge the "at least in part" or "one purpose" standard applied in these two instructions. In other words, they argue a defendant should not be convicted under the Act when his offer, payment, solicitation, or receipt of remuneration was motivated merely *in part* to induce or in return for referrals; rather, they suggest conviction is only appropriate

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[11] In Instruction #33, the district court charged the jury as follows:

> Likewise, in order to sustain its burden of proof against the doctor defendants for violating the Anti-Kickback statute, the government must prove beyond a reasonable doubt that the defendant under consideration solicited or received the remuneration with specific criminal intent that the remuneration be "in return for" referrals. To solicit or receive remuneration in return for referrals means to solicit or receive remuneration with intent to allow the remuneration to influence the reason and judgment behind one's patient referral decisions. The intent to be influenced must, *at least in part*, have been the reason the remuneration was solicited or received.
>
> On the other hand, defendants Robert LaHue and Ronald LaHue cannot be convicted merely because they received remuneration wholly in return for services and also decided to refer patients to the hospital. Likewise, mere referral of patients because of oral encouragement or because of a belief that the place to which the patients are to be referred is attractive does not violate the law. There must be a solicitation or receipt of remuneration in return for referrals, as I have just defined it.

(Emphasis added.)

when the motivation to induce or in return for referrals was the defendant's *primary purpose.*

In their opening briefs – filed before the *McClatchey* panel published its decision – defendants correctly noted this was an issue of first impression in this circuit, and argued for the rejection of the "one purpose" standard enunciated by the Third Circuit in *United States v. Greber,* 760 F.2d 68 (3d Cir.), *cert. denied,* 474 U.S. 988 (1985). Defendants argued the "one purpose" standard was inappropriate because: (1) "[i]t converts a criminal statute passed with a specific aim – to deter and punish abusive practices that threaten the integrity of federally funded health care programs – into prohibition of *all* arrangements, no matter how slight, that implicate patient referrals" (emphasis in original); (2) as a policy matter, it will destroy highly beneficial health care arrangements; (3) statutory construction principles require a narrower interpretation of the Act; (4) the Department of Health and Human Services, charged by statute in 1987 to promulgate regulations defining conduct not subject to the Act's prohibitions, did not provide "any authoritative interpretation of the [Act] as it applied to hospital-physician relationships" during the term of the charged conspiracy; and (5) it leads to "unduly confusing" jury instructions and courts should utilize the actual language of the Act instead. Finally, anticipating this court's potential agreement with *Greber,* defendants argued the "one purpose" standard renders the Act unconstitutionally vague by vesting undue discretion in "government officials to decide what is legal and what is illegal."

In *McClatchey,* this court rejected Mr. McClatchey's same argument "that the district court improperly

instructed the jury it could convict [him] if remuneration was paid *'at least in part'* to induce patient referrals." *McClatchey*, 217 F.3d at 826, 834 (emphasis added). We held Instruction #32 "accurately informed the jury of the applicable law," because "a person who offers or pays remuneration to another person violates the Act, so long as *one purpose* of the offer or payment is to induce Medicare or Medicaid patient referrals." *Id.* at 835 (emphasis added). We recognized "[t]he only three Circuits to have decided this issue have all adopted the 'one purpose' test." *Id.* (citing cases from the Third, Fifth, and Ninth Circuits). Our decision to adopt the "one purpose" test rested upon our review of, and agreement with, the "sound reasoning" of the Third Circuit in *Greber*. *Id.* In this appeal, the government claims defendants' challenges to Instructions #32 and 33 are foreclosed by the *stare decisis* effect of *McClatchey*, the Act as construed by *McClatchey* is not void for vagueness under due process, and, therefore, defendants are not entitled to a new trial based on the jury instructions. We agree with the government.[12]

"We are bound by the precedent of prior panels absent en banc reconsideration or a superceding contrary decision by the Supreme Court." *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993) (per curiam), *cert. denied*, 513 U.S. 807 (1994). In this case, defendants' petition for initial hearing *en banc* on this issue was denied, and the Supreme Court

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[12] Our resolution of these issues moots defendants' sufficiency of the evidence challenge to Counts One and Three of the indictment, which is predicated on our finding the "primary purpose" standard applies.

has not decided a case on the Act since our *McClatchey* decision. *See* Order filed August 3, 2000. Accordingly, *McClatchey* is controlling authority,[13] and we must conclude Instruction #32 accurately informed the jury of the law applicable to Mr. Anderson.

Similarly, we conclude the reasoning underlying the *McClatchey* holding applies equally to remuneration solicited or received in return for Medicare or Medicaid patient referrals. *See United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000) ("The precedent of prior panels which this court must follow includes not only the very narrow holdings of those prior cases, but also the reasoning underlying those holdings, particularly when such reasoning articulates a point of law."); *see also McClatchey*, 217 F.3d at 835 (citing the Ninth Circuit's opinion in *United States v. Kats*, 871 F.2d 105, 108 (9th Cir. 1989) adopting the "one purpose" standard); *Kats*, 871 F.2d at 108 (adopting the "one purpose" standard and affirming the defendant's conviction for receiving kickbacks in exchange for referral of Medicare payments). As a practical matter, if we held otherwise, we could illogically be

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[13] Defendants cite *United States v. Boyd*, 958 F.2d 247, 249-50 (8th Cir. 1992) to support their argument that *McClatchey* does not control here. *Boyd* is inapposite, because it dealt with a *res judicata* argument by the government on issues not briefed by the parties to the first appeal or decided by the district court. *See Boyd*, 958 F.2d at 249. In this case, we rely on our *In re Smith* rule, which is based on *stare decisis*, *see United States v. Nichols*, 169 F.3d 1255, 1261 (10th Cir.), *cert. denied*, 528 U.S. 934 (1999), and the jury instruction issue was both briefed by the parties in the first appeal, *see McClatchey*, 217 F.3d at 826, 831, 834-35, and decided by the district court pursuant to defendants' motions for a new trial. *See Anderson*, 85 F. Supp. 2d at 1069, 1074-75.

faced with a case in which the offeror/payor is deemed to violate the Act, but the offeree/payee is not. Accordingly, we conclude Instruction #33 accurately informed the jury of the law applicable to the LaHues.

We turn to defendants' due process challenge to our "one purpose" interpretation of the Act as unconstitutionally vague, which is the only unresolved issue after *McClatchey* and our above conclusions. "When reviewing a statute alleged to be vague, courts must indulge a presumption that it is constitutional, and the statute must be upheld unless the court is satisfied beyond all reasonable doubt that the legislature went beyond the confines of the Constitution." *United States v. Day*, 223 F.3d 1225, 1228 (10th Cir. 2000) (quotation marks and citation omitted). "Under settled law, a broadly worded statute can be sufficiently clarified by a narrowing, authoritative interpretation to fend off a vagueness challenge." *Dirks v. SEC*, 802 F.2d 1468, 1471 (D.C. Cir. 1986).

Defendants appear to argue this court's "one purpose" interpretation of the Act is unconstitutional on its face and as applied to them. As a preliminary matter, we hold their facial challenge is prohibited. *See United States v. Gaudreau*, 860 F.2d 357, 360-61 (10th Cir. 1988). Facial challenges are permitted when the statute "threaten[s] to chill constitutionally protected conduct" and "in some instances . . . on pre-enforcement review." *Id.* at 360-61. In this case, defendants have not argued, nor do we perceive, that the Act threatens to chill constitutionally

protected conduct,[14] and this is not a pre-enforcement situation. *See id.* at 361. Accordingly, we must examine the Act, as applied in this case, for vagueness in light of the conduct with which defendants are charged. *See id.*

"[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). "The same facets of a statute usually raise concerns of both fair notice and adequate enforcement standards. Hence the analysis of these two concerns tends to overlap. The Supreme Court, however, while . . . recognizing the second concern as more important, continues to treat each as an element to be analyzed separately." *Gaudreau*, 860 F.2d at 359-60. We evaluate each element in turn.[15]

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[14] *See Hanlester Network v. Shalala*, 51 F.3d 1390, 1398 (9th Cir. 1995) ("[The Act] chills no constitutional rights."); *United States v. Bay State Ambulance & Hosp. Rental Serv., Inc.*, 874 F.2d 20, 32-33 (1st Cir. 1989) ("[T]he [Act] is not the type that can be used to chill constitutionally protected rights.").

[15] Defendants base their vagueness challenge primarily on the alleged inadequacy of enforcement standards under a "one purpose" test. Because they claim cases evaluating the Act under the fair notice element are "irrelevant," defendants do not address whether they could reasonably understand their conduct was prohibited by the Act. *See Gaudreau*, 860 F.2d at 360 ("[C]riminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed." (quotation marks, alteration, and citation omitted)); *see also Day*, 223 F.3d at 1229 (same). Accordingly, in order to resolve this question and in light of the interrelated nature of the fair notice and enforcement standards inquiries,

Regarding fair notice, "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Day*, 223 F.3d at 1228 (addressing the defendant's vagueness challenge to a federal criminal statute) (quotation marks and citations omitted). In this case, the evidence produced at trial clearly demonstrated defendants negotiated and entered "consulting" contracts in an attempt to camouflage an underlying agreement to exchange remuneration for patient referrals. Therefore, defendants' conduct is the very conduct contemplated by the Act, and they cannot successfully challenge the Act for vagueness as to fair notice. *See id.* at 1228-29.

Specifically, the record shows the following about the Baptist LaHues relationship:[16] (1) the LaHues entered negotiations with Baptist, because University Hospital refused to acquiesce to their demand for an increased salary in return for continued patient referrals; (2) the 1985 contract and 1986 agreement established a fee of $150,000 per year from Baptist to the LaHues; (3) Baptist and the LaHues resolved the fee before discussing an arrangement to justify it; (4) from Mr. Anderson's perspective, these negotiations were grounded in the hospital receiving patient referrals, and he told Ms. Grim the Baptist Blue Valley relationship was a business deal in

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we address the fair notice element as well. *See Gaudreau*, 860 F.2d at 359-60.

[16] We need address only the Baptist-LaHues relationship because of its similarity to: (1) Dr. Robert LaHue's interaction with the five other hospitals for which he was convicted of violating the Act; and (2) Dr. Ronald LaHue's interaction with the two other hospitals for which he was convicted of violating the Act. *See Anderson*, 85 F. Supp. 2d at 1060-64; *supra* Part I.

which Baptist would pay money to Blue Valley in return for patient referrals; and (5) once Baptist began the payments, Blue Valley referred massive numbers of patients to Baptist with a corresponding halt in referrals to University Hospital.

Further evidence substantiates this was a pay-for-patients scheme. For instance, the record on whether the LaHues fulfilled their commitments under the 1985 contract and 1986 agreement and Mr. Anderson's knowledge thereof reveals: (1) Ms. Grimes was unaware of the 1985 contract, which purportedly made the LaHues co-directors of gerontology services, and she documented the LaHues' failure to fulfill all but one of the activities required of them in the 1986 agreement as of March 1987; (2) Ms. Flynn testified the LaHues did nothing required of them in the 1986 agreement from 1988 to 1990, and intimated Mr. Anderson knew this because he was "very knowledgeable" about the Clinic's operations; (3) in late 1991/early 1992, Mr. McGrath met with Mr. Anderson and discussed (a) Dr. Robert LaHue's statement that he and Dr. Ronald LaHue were not performing some of the services listed in the 1986 agreement, and (b) documentation reflecting the LaHues consulted at Baptist for only two hours per week[17]; and (4) Mr. Eckard testified the LaHues provided minimal to no services under the 1985 contract, and failed to provide the enumerated services in the 1986 agreement on a routine basis, if at all.

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[17] Annualizing this data, Baptist was paying the LaHues the effective rate of $1,442 per hour.

Finally, we note the evidence supports the following conclusions: (1) although Mr. Anderson controlled whether the payments would continue, he did not stop them when he learned the services were neither entirely bona fide nor performed by the LaHues, and the payments were more than fair market value for consulting services; and (2) when it appeared the Baptist/LaHues relationship might end in 1994, Mr. Anderson worked to develop a strategy to replace the Blue Valley patients, but did nothing to replace the LaHues' consulting services. We therefore conclude the evidence produced at trial demonstrated defendants knew their conduct, which was clearly a pay-for-patients scheme, was prohibited by the Act. Accordingly, their vagueness challenge as to fair notice must fail. *See Day*, 223 F.3d at 1228-29.

Regarding the adequacy of enforcement standards, "[d]ue process requires that legislation state reasonably clear guidelines for law enforcement officials, juries, and courts to follow in discharging their responsibility of identifying and evaluating allegedly illegal conduct." *Gaudreau*, 860 F.2d at 363. "Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' " *Kolender*, 461 U.S. at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)). A statute is unconstitutionally vague if its language and construction by the courts vest authority in law enforcement officers, prosecutors, and

juries to assign their own subjective meaning to an element of the offense. *See Kolender*, 461 U.S. at 355-61; *Gaudreau*, 860 F.2d at 363-64.[18]

Even if defendants understood the illegality of a pay-for-patients scheme under the Act, they claim the Act is unconstitutionally vague because it encourages arbitrary enforcement. Defendants argue "prosecutors and agency officials may choose to proceed criminally against virtually anyone in the health care community" under the "one purpose" test, which they describe as having "limitless reach." Specifically, they claim the "one purpose" test

> makes virtually every arrangement between a hospital and a physician unlawful, because the hospital executive will always have patient referrals in mind, at least to some degree. . . .
>
> . . . In other words, in the hospital-physician context at least, according to the district court, *all conduct is illegal* unless the [Department of Health and Human Services] has expressly, or through an 'advisory' dispensation, made a specific act legal.

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[18] For example, the Supreme Court struck down as unconstitutionally vague a statute criminalizing a person's failure to provide "credible and reliable" identification to police during a valid investigative detention, because the determination of the credibility and reliability of identification was left to the subjective judgment of the police. *See Kolender*, 461 U.S. at 355-61. In light of the "full discretion accorded to the police," the Court concluded the statute "furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, and confers on police a virtually unrestrained power to arrest and charge persons with a violation." *Id.* at 360 (quotation marks and citations omitted).

We disagree for two reasons.

First, the Act explicitly prohibits any remuneration knowingly and willfully offered or paid to induce, or solicited or received in return for, Medicare or Medicaid patient referrals. *See* 42 U.S.C. § 1320a-7b(b). Defendants fail to point to any language in the Act or the "one purpose" test that vests authority in law enforcement officers, prosecutors, and juries to assign their own subjective meaning to an element of the offense. We do not perceive any such problem, and conclude a fair reading of the Act provides reasonably clear guidelines for law enforcement officials, juries, and courts to evaluate and discern illegal conduct. *See Gaudreau*, 860 F.2d at 363-64. Moreover, it is the application of the Act to defendants by law enforcement officials we review; in an "as applied" examination, defendants may not generalize beyond the conduct with which they are charged. *See id.* at 360-61. As noted above, the evidence produced at trial shows defendants clearly participated in a pay-for-patients scheme. Thus, enforcement of the Act as applied to defendants was not arbitrary or discriminatory. *See United States v. Corrow*, 119 F.3d 796, 804 (10th Cir. 1997) ("Our analysis of the fairness issue infuses our disposition of the second vagueness concern, the potential for arbitrary and discriminatory enforcement."), *cert. denied*, 522 U.S. 1133 (1998).

Second, defendants' argument ignores the actual instructions given in this case. The district court instructed the jury that

> [Mr.] Anderson . . . cannot be convicted merely because [he] hoped or expected or believed that referrals may ensue from remuneration that was

> designed wholly for other purposes. Likewise, mere oral encouragement to refer patients or the mere creation of an attractive place to which patients can be referred does not violate the law.

The district court further instructed the jury that

> Robert LaHue and Ronald LaHue cannot be convicted merely because they received remuneration wholly in return for services and also decided to refer patients to the hospital. Likewise, mere referral of patients because of oral encouragement or because of a belief that the place to which patients are to be referred is attractive does not violate the law.

This application of the Act by the district court clearly allows business relationships between a hospital and physician where the motivation to enter into the relationship is for legal reasons entirely distinct from the collateral hope for or decision to make referrals. *See McClatchey*, 217 F.3d at 834 & n.7. Accordingly, contrary to defendants' assertion, the Act, as applied in this case, does not make all conduct illegal when a hospital executive or physician has referrals in mind.

In summary, under the controlling authority of *McClatchey* and for the other reasons articulated herein, we conclude the district court correctly instructed the jury on the Act. We hold the Act, as applied to defendants, is not unconstitutionally vague. Accordingly, defendants are not entitled to a new trial on this issue.

B. Rule 801(d)(2)(E) of the Federal Rules of Evidence

Rule 801(d)(2)(E) of the Federal Rules of Evidence excludes from the hearsay prohibition "statement[s] by a coconspirator of a party during the course and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E).

> In order for statements to be admissible under Rule 801(d)(2)(E), the proponent of the evidence must establish, by a preponderance of the evidence, that: (1) a conspiracy existed; (2) the declarant and the defendant were both members of the conspiracy; and (3) the statements were made during the course of, and in furtherance of, the conspiracy.

United States v. Williamson, 53 F.3d 1500, 1517-18 (10th Cir.) (citations omitted), *cert. denied*, 516 U.S. 882 (1995).

Defendants[19] claim the district court erroneously admitted over sixty documents under Rule 801(d)(2)(E). Specifically, they challenge the district court's conclusion that the word "conspiracy" includes a lawful common plan, and therefore argue documents related to such a plan are inadmissible. The government argues the district court correctly determined Rule 801(d)(2)(E) contemplates any common plan or enterprise, whether legal or illegal, in which the declarant and Mr. Anderson or the LaHues jointly participated. In the alternative, the government claims any error in admitting the documents under Rule 801(d)(2)(E) was harmless.

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[19] In this section, "defendants" refers to Mr. Anderson and the LaHues.

We conclude the admission of these disputed documents constitutes harmless error.[20] *See United States v. Jones*, 44 F.3d 860, 873 (10th Cir. 1995) ("While we review evidentiary rulings by considering the record as a whole, deference to the trial judge is heightened when reviewing rulings on hearsay questions. This court applies a harmless error standard when reviewing trial courts' rulings on hearsay objections resting solely on the Federal Rules of Evidence."); *United States v. Perez*, 989 F.2d 1574, 1582 (10th Cir. 1983) (en banc) (before considering whether remand is appropriate for an alledged Rule 801(d)(2)(E) error, this court should assume the challenged statements were inadmissable and then assess whether their admission was harmless error). In applying the harmless error standard, we must first resolve whether defendants' objection to the documents rested solely on the Federal Rules of Evidence. On appeal, defendants argue the admission of these documents violated their Sixth Amendment right to confrontation. However, the government claims defendants did not raise this Confrontation Clause argument to the district court, and waived it on appeal by failing to claim the district court committed plain error by not raising the issue *sua sponte*.

"[W]here a Confrontation Clause objection is not explicitly made below we will not address the constitutional issue in the absence of a conclusion that ti was plain error for the district court to fail to raise the constitutional issue *sua sponte*." *United States v. Perez*, 989 F.2d 1574, 1582 (10th Cir. 1993) (en banc). Defendants do not

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[20] Accordingly, we will not address the government's alternative theories of admissibility argument.

respond to the government's argument in their reply brief, and, as the government claims, they do not argue the district court committed plain error in failing to raise the constitutional issue *sua sponte*. For this reason, we deem the issue waived. *See United States v. Hardwell*, 80 F.3d 1471, 1492 (holding issue waived when party failed "to make any argument or cite any authority to support his assertion"), *reh'g granted in part on other grounds*, 88 F.3d 897 (10th Cir. 1996). Accordingly, we are left to review only a hearsay objection, which we review under the nonconstitutional harmless error standard. *See Perez*, 989 F.2d at 1582.

"A [nonconstitutional] harmless error is one that does not have a substantial influence on the outcome of the trial; nor does it leave one in grave doubt as to whether it had such effect." *Jones*, 44 F.3d at 873. A conclusion that an alleged error is harmless completes our review of a hearsay objection. *See id.* at 873-75. The Background section of this opinion is supported by witness testimony and exhibits to which there is no objection on appeal; in other words, it was constructed without any reference to the disputed documents. *See supra* Part I. Our review of the disputed documents coupled with the overwhelming defendants' guilt of the charged offenses revealed in the Background section, convinces us that the admission of the disputed documents did not substantially influence the trial's outcome and does not leave us in grave doubt as to whether they had such effect. See *supra* Part III.A. Accordingly, even if the district court erroneously admitted the disputed documents, we hold their admission constituted harmless error.

Finally, defendants claim "the district court failed to require the government to identify the declarant of the hearsay statements being admitted into evidence over the objection of the defense." However, they fail to identify the specific statements the district court allegedly admitted in error, or even meet our requirement of providing citations to the record where these statements may be found. *See* Fed. R. App. P. 28(a)(9)(A); Tenth Cir. R. 28.2(C)(2), (3)(a). "Due to these failures, this court cannot even attempt to assess the merits of [their] argument. The issue of the admissibility of this evidence is therefore waived on appeal." *McClatchey*, 217 F.3d at 835-36.

C. Variances

Mr. Anderson and Dr. Robert LaHue claim certain variances between the indictments and case presented at trial substantially prejudiced their right to a fair trial. In its ruling on their motions for a new trial, the district court stated: "The court agrees with the defendants that there were two variances in this case. The first was the variance the court recognized at trial when it narrowed the count one conspiracy. The second was the variance with respect to the government's failure of proof as to the lawyer defendants." *Anderson*, 85 F. Supp. 2d at 1070.

More specifically, the "other hospitals variance" represents the government's failure to present sufficient evidence to demonstrate that any defendant but the LaHues participated in a conspiracy extending to the six hospitals other than Baptist. *See id.* at 1053. The "attorney defendants variance" reflects the acquittal of Ms. Lehr and Mr. Thompson at the close of the government's case.

See id. Despite these variances, the district court denied the motions for a new trial. *See id.* at 1051-52, 1069-73. On appeal, Mr. Anderson claims these two variances entitle him to a new trial, while Dr. Robert LaHue argues the "attorney defendants variance" entitles him to a new trial.[21]

"Whether a variance between an indictment and the case presented at trial is sufficiently prejudicial to warrant a new trial is a question of law. . . . A new trial is only necessary, however, if the variance substantially prejudiced the defendant's right to a fair trial." *McClatchey*, 217 F.3d at 831. In *McClatchey*, this court faced the same two variances at issue here, concluded neither variance substantially prejudiced Mr. McClatchey's right to a fair trial, and reversed the district court's decision to grant Mr. McClatchey's motion for a new trial. *See id.* at 831-34. Because Mr. McClatchey, Mr. Anderson, and the LaHues were tried together, the government argues the law of the case doctrine forecloses our review of this issue and requires us to hold insufficient prejudice existed to require a new trial.[22]

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[21] Dr. Robert LaHue raises, for the first time on appeal, an alternative argument that the district court's severance of the false claims and witness tampering counts after the close of the government's case was a prejudicial variance warranting a new trial. However, he "has not attempted to articulate a reason for us to depart from the general rule that 'a federal appellate court does not consider an issue not passed upon below.' " *Walker v. Mather (In re Walker)*, 959 F.2d 894, 896 (10th Cir. 1992) (quoting *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)). Therefore, we decline to consider his alternative argument. *See id.*

[22] Although the government also argues stare decisis controls this issue, we note its argument focuses on the law of

Defendants[23] claim the *McClatchey* panel "did not have a complete record and based its decision on factually erroneous conclusions," and, accordingly, we should find the law of the case doctrine does not control and revisit the issue. We hold the law of the case doctrine controls the "other hospitals variance" issue, and, in combination with the invited error doctrine, also controls the "attorney defendants variance" issue.

"The law of the case doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *United States v. Alvarez*, 142 F.3d 1243, 1247 (10th Cir.) (quotation marks and citations omitted), *cert. denied*, 525 U.S. 905 (1998). "Furthermore, when a rule of law has been decided adversely to one or more codefendants, the law of the case doctrine precludes all other codefendants from relitigating the legal issue." *United States v. Aramony*, 166 F.3d 655, 661 (4th Cir.), *cert. denied*, 526 U.S. 1146 (1999). As a "rule of practice" and not a limit on a court's power,

> we will depart from the law of the case doctrine in three exceptionally narrow circumstances:
>
> (1) when the evidence in a subsequent trial is substantially different;

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the case doctrine and supporting case law. Accordingly, and in light of our resolution of this issue, we do not reach the government's stare decisis argument.

[23] In this section, "defendants" refers to Mr. Anderson and Robert LaHue.

> (2) when controlling authority has subsequently made a contrary decision of the law applicable to such issues; or
>
> (3) when the decision was clearly erroneous and would work a manifest injustice.

Alvarez, 142 F.3d at 1247.

As to the "other hospitals variance," Mr. Anderson does not argue any of these three exceptions apply. In addition, he claims Mr. McClatchey "was in all relevant respects identically situated to [Mr.] Anderson." Accordingly, we affirm the district court's denial of Mr. Anderson's motion for a new trial on the basis of the "other hospitals variance" in light of *McClatchey* and the law of the case doctrine. *See McClatchey*, 217 F.3d at 833-34 (holding "any variance caused by the narrowing of the conspiracy charge did not substantially prejudice [Mr.] McClatchey.")

As previously noted, defendants undertake the "formidable task" of attempting to convince us the *McClatchey* decision was clearly erroneous and would work a manifest injustice as to the "attorney defendants variance." *Alvarez*, 142 F.3d at 1247. Specifically, they claim "the panel partly based its decision that the attorney variance did not prejudice [Mr.] McClatchey on the erroneous premise that the jury 'was not informed that the district court had acquitted the attorney defendants' and therefore could not conclude he must have been guilty because the court had not acquitted him too" (quoting *McClatchey*, 217 F.3d at 833). However, they do not cite any case law in which such an argument prevailed.

See Alvarez, 142 F.3d at 1247 ("[O]ur own research indicates that while courts may often pay lip service to the clearly erroneous/manifest injustice exception, they rarely, if ever, invoke it.").

We acknowledge defense counsel informed the jury of the attorney defendants' acquittal during closing arguments, but this does not make the *McClatchey* decision either clearly erroneous or even remotely work a manifest injustice for the following reasons. Although defendants call this a "crucial point," they acknowledge it was only one of several reasons why the *McClatchey* panel held Mr. McClatchey's right to a fair trial had not been substantially prejudiced due to this variance. *See McClatchey*, 217 F.3d at 831-33. Here, defendants raise the same claims as did Mr. McClatchey, but do not challenge the *McClatchey* panel's other reasoning. Therefore, defendants themselves limit our review to this one claim of error regarding the jury's knowledge of the attorney defendants' acquittal.

Focusing on this sole error, we conclude the jury's awareness of the district court's acquittal of the attorney defendants did not substantially prejudice their right to a fair trial in light of the invited error doctrine. "The invited error doctrine prevents a party from inducing action by a court and later seeking reversal on the ground that the requested action was in error." *United States v. Edward J.*, 224 F.3d 1216, 1222 (10th Cir. 2000) (quotation marks and citation omitted). The *McClatchey* panel correctly determined the district court did not inform the jury of the attorney defendants' acquittal in its jury instructions. *See McClatchey*, 217 F.3d at 833. Instead, the

jury was so informed by defendants' counsel during their closing arguments as a result of the following events.

Toward the end of its closing argument, the government stated: "The evidence in this case has been that the attorneys were well aware that the – that this was a paying for patients deal and worked to develop agreements that covered up that fact." On completion of the government's argument, the district court recessed the proceedings and heard from Mr. Anderson's counsel about this statement. Counsel argued this statement "opened the door" to allow defense counsel to present to the jury the acquittal of the attorney defendants. The district court agreed and stated: "You may tell the jury that the two lawyer defendants were found – were acquitted by order of the court." Defendants' counsel each took advantage of this ruling.

In his closing argument, Mr. Anderson's counsel claimed the acquittal of the attorney defendants created reasonable doubt as to his client's guilt:

> In this case the quality of the Government prosecution creates reasonable doubt. And that's what the jury system is set out to do is to correct these abuses.
>
> For instance, the last argument that was made to you by the Government in this case had to do with the attorneys. And she said that they were knowing participants in a – knowing participants that this was a scheme to pay [sic] patients and that they drafted sham agreements.
>
> Well, folks, these two lawyers have been acquitted by the court. They were acquitted here

because the court found that there was no evidence beyond a reasonable doubt that these lawyers had done anything. And yet the Government stood up here in argument, and despite the fact they had been acquitted, and told you that those lawyers had, in fact, been knowing participants in crime and that's just not right.

That in itself should create a reasonable doubt as to all the other defendants in this case, particularly the Baptist defendants.

. . . .

Now the attorneys have been acquitted in this case. If they're not guilty and Mr. Anderson relied upon what they said, does that – how does that affect Mr. Anderson's specific intent in the case? He cannot have the specific intent to violate the law if those lawyers, who are not guilty, advise him appropriately, which they did.

Dr. Robert LaHue's counsel similarly argued:

Now, one other thing that Ms. Treadway spoke about were some of the defenses that we have presented to you, and that is the defense of good faith. And all of the witnesses, all of the Defendants – the evidence is clear, that all of the Defendants relied on the attorneys who were acquitted in this case and relied on attorneys for other hospitals to process and review and prepare these agreements to make them legal and appropriate. The evidence is uncontroverted about that. Nobody ever took – you never had an attorney come in here and said they took my agreement and changed it, took it out and changed it or modified it. You never had that.

> These attorneys were acquitted. And the testimony of all the witnesses was – certainly the hospital witnesses who employed the attorneys and witnesses concerning the Doctors' activities who said the Doctors knew about and relied on the advice of the attorneys that are – that are now acquitted and found not guilty. And so there is good faith here, no doubt about it.

Obviously, neither counsel believed their statements would prejudice defendants' right to a fair trial. In other words, they did not believe the jury would interpret the district court's acquittal of the attorney defendants, along with the continued prosecution of Mr. Anderson and Dr. Robert LaHue, as a signal the court believed defendants were guilty. Indeed, counsel affirmatively sought the opportunity to argue about the acquittal of the attorney defendants, rather than object to the government's argument and have it stricken along with an instruction from the court for the jury to disregard the argument. We conclude the invited error doctrine applies and no prejudice was suffered, because defendants' argument on appeal is a complete reversal from the position they sought to and did assert during closing argument. *See John Zink Co. v. Zink*, 241 F.3d 1256, 1259 (10th Cir. 2001) (holding the invited error doctrine precluded review of appellants' argument on appeal that was directly contradictory to its position in the district court).

Finally, defendants fail to explain, as they must in order to prevail, how the application in this appeal of the ruling in *McClatchey* would work a manifest injustice. *See Alvarez*, 142 F.3d at 1247. Indeed, as discussed in *McClatchey*, the district court told the jury that "the

charges against [the attorney defendants] . . . have been removed from your consideration and are no longer before you for decision," and instructed them: "Do not concern yourself with these developments and do not speculate about them." *See McClatchey*, 217 F.3d at 833. "[T]his court presumes that the jury followed the district court's instructions and therefore did not speculate as to the reason why the charges against the attorney defendants had been removed from its consideration." *Id.* (citing *United States v. Ailsworth*, 138 F.3d 843, 850 (10th Cir.), *cert. denied*, 525 U.S. 896 (1998)).[24] As a result, we do not perceive a manifest injustice resulting from the application of the *McClatchey* ruling on the identical "attorney defendants variance" issue raised in this appeal.

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[24] Defendants argue they faced a "Hobson's choice" created by the government's closing argument quoted above – either let the government's claim go unchallenged or "reluctantly" tell the jury of the attorney defendants' acquittal, with prejudice either way. We do not agree. Defense counsel had a third option – they could have requested the district court strike that portion of the government's closing and instruct the jury to disregard the statement and focus on the jury instructions as to the attorney defendants, something defense counsel and the court did with regards to other portions of the government's closing. This would have returned defendants to the position deemed non-prejudicial in *McClatchey*, where the jury is presumed to follow the "district court instructions and therefore did not speculate as to the reason why the charges against the attorney defendants had been removed from its consideration." *McClatchey*, 217 F.3d at 833. Further, the statements to the district court and arguments to the jury on this issue by defense counsel clearly reveal their desire to present the acquittal of the attorney defendants to the jury; any reluctance in informing the jury of the acquittals must have accrued after these arguments were unsuccessful.

Accordingly, we affirm the district court's denial of defendants' motion for a new trial on the basis of the "attorney defendants variance" in light of *McClatchey* and the law of the case and invited error doctrines. *See id.* at 833-34 ("[E]ven if the district court's acquittal of the attorney defendants created a variance between the allegations in the indictment and the case presented at trial, this court is unconvinced that such a variance substantially prejudiced [Mr.] McClatchey.").

D. Use Immunity

In a two-part argument, the LaHues claim the district court abused its discretion by refusing to grant use immunity to twelve proposed defense witnesses who invoked the Fifth Amendment and refused to testify at trial. First, the LaHues argue the government is guilty of prosecutorial misconduct, because it allegedly engaged "in a plan to unduly distort the fact-finding process" by: (1) identifying these twelve individuals as unindicted co-conspirators; (2) leading them to believe, "in the pretrial setting," they faced potential criminal prosecution, which caused them to invoke the Fifth Amendment and refuse to testify; (3) claiming, "near the end of the trial," the government did not perceive them as criminally culpable; and (4) confirming, prior to sentencing in this case, it would not subject any of the unindicted co-conspirators to criminal charges. Second, the LaHues argue this prosecutorial misconduct authorized the district court to grant these twelve witnesses use immunity, and its refusal to do so constitutes an abuse of discretion.

In response, the government claims it appropriately listed these individuals as unindicted co-conspirators for Rule 801(d)(2)(E) purposes. It argues "[t]he defendants offer no facts of discriminatory use of immunity [by the government] to gain a tactical advantage, and offer no facts that the government *forced* any witness to invoke the Fifth Amendment." (Emphasis in original.) Finally, it cogently notes the LaHues failed on appeal to identify the witnesses allegedly affected, proffer their expected testimony, or explain how the witnesses "were essential to their defense."

The district court rejected the LaHues' arguments for judicial grants of use immunity before, during, and after trial, emphasizing "there is no indication that the government engaged in a 'deliberate attempt to distort the fact finding process.' " *Anderson*, 85 F. Supp. 2d at 1081 (denying defendants' motion for a new trial based on prosecutorial misconduct) (quoting *United States v. Hunter*, 672 F.2d 815, 818 (10th Cir. 1982), *abrogation on other grounds recognized in United States v. Call*, 129 F.3d 1402, 1404 (10th Cir. 1997), *cert. denied*, 524 U.S. 906 (1998)).[25] We review

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[25] During the trial, the district court granted defendants the alternative relief sought in their "Motion for Order Compelling Judicial Immunity." *See Anderson*, 85 F. Supp. 2d at 1081 n.29. Specifically, the district court gave defendants the opportunity to call the attorneys of some of these witnesses to testify, pursuant to Rule 807 of the Federal Rules of Evidence, about what the witnesses told FBI agents in government interviews. *See id.* Although they sought this relief, defendants decided against calling these attorneys as witnesses "based on strategic trial issues."

the district court's decisions under an abuse of discretion standard. *See United States v. Gabaldon*, 91 F.3d 91, 94 & n.2 (10th Cir. 1996).

" 'The power to apply for immunity . . . is the sole prerogative of the government being confined to the United States Attorney and his superior officers.' " *Hunter*, 672 F.2d at 818 (quoting *United States v. Graham*, 548 F.2d 1302, 1314 (8th Cir. 1977)). Accordingly, courts have no inherent authority to grant a witness use immunity. *See id.* However, in *Hunter*, we left open the possibility "that where the prosecutor's denial of immunity is a deliberate attempt to distort the fact finding process, a court could force the government to choose between conferring immunity or suffering an acquittal." *Hunter*, 672 F.2d at 818; *see United States v. Chalan*, 812 F.2d 1302, 1310 (10th Cir. 1987) (same), *cert. denied*, 488 U.S. 983 (1988).

We need not decide this legal question and are not persuaded to overturn the district court's finding for two reasons. First, the LaHues fail to "cite the precise reference in the record where the issue was . . . ruled on" initially as required by our rules. 10th Cir. R. 28.2(C)(2). The district court's pretrial ruling on this issue is critical, because the court referred to and relied on its reasoning in that ruling to deny the subsequent motions. *See, e.g., Anderson*, 85 F. Supp. 2d at 1081 ("The court rejects the defendants' arguments for the same reasons it rejected them before and during trial."). While the LaHues cite to a "Minute Order" in which the district court memorialized its denial of their "motion for grant of judicial immunity or for stay [doc. 142] . . . as set forth on the record," they do not identify where "on the record" the district court ruling exists. Second, as the government

claims, the LaHues do not identify the twelve individuals at issue, provide a record citation for the proffer of their expected testimony, or explain how their testimony would be material, exculpatory, and not cumulative as well as unavailable from any other source. *See United States v. Bahadar*, 954 F.2d 821, 826 (2d Cir.) (requiring such evidence to find a distortion of the fact-finding process), *cert. denied*, 506 U.S. 850 (1992).

We will not "sift through" this case's voluminous record to find support for the LaHues' claims, "but instead defer to the district court's rulings." *Mile High Indus. v. Cohen*, 222 F.3d 845, 854 (10th Cir. 2000). Likewise, we will not substitute our judgment for that of the district court under the abuse of discretion standard of review, *see In re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig.*, 669 F.2d 620, 623 (10th Cir. 1982), especially in the absence of facts identifying the material, exculpatory, and non-cumulative nature of the witnesses' testimony as well as its unavailability from any other source. *See United States v. Rodriguez-Aguirre*, 108 F.3d 1228, 1237 n.8 (10th Cir.) (holding it is the appellant's responsibility to tie the relevant facts, supported by specific citations to the record, to his legal arguments), *cert. denied*, 522 U.S. 847 (1997).

Accordingly, the district court did not abuse its discretion in refusing to grant immunity to the twelve unnamed defense witnesses, because use immunity is the sole prerogative of the executive branch and defendants provided no facts to support their claim the government

engaged in a deliberate attempt to distort the fact-finding process.[26]

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[26] Notwithstanding the basis for our decision, we have reviewed every document cited by the LaHues on this issue in their appellate briefs. In their "Motion for Order Compelling Judicial Immunity" filed on the close of the government's case, the LaHues listed twenty unindicted co-conspirators and presented "proffers of potential testimony" in varying levels of detail for fourteen of them. They repeated this list and attached a copy of these "proffers" to their motion for a new trial, which they inexplicably do not address or cite on appeal. Further, although the LaHues cite to the defense witness lists in their appellate briefs, they failed to provide these documents in the record on appeal.

Even if we were to consider this material as the basis for the LaHues' appeal of this issue, there are three reasons why it is insufficient to find the district court abused its discretion. First, we do not know whether the twelve witnesses on appeal are a subset of the twenty listed in these motions, or are others from the over 160 people defendants allegedly listed as witnesses but did not call at trial. Second, the LaHues provide information regarding testimony from only fourteen of the twenty witnesses listed in the motions, and of these: (1) it is unclear whether three were even subpoenaed by the defense or ever invoked the Fifth Amendment; (2) there is no proffer of testimony for four; (3) virtually the entire "proffer" of six are the conclusory assertions that the witness both "affirms," "confirms," "defend[s]," or "assert[s]" the "legitimate nature" of the relationship between the hospital and the LaHues and "did not perceive the relationship to be a payment for patients;" and (4) the four somewhat detailed proffers provide no basis for determining whether this testimony was unavailable from any other source. Finally, in their motion for a new trial, the LaHues claim the witnesses who did testify at trial presented "exculpatory" testimony for them, but do not explain how those who allegedly invoked the Fifth Amendment would offer testimony, assuming *arguendo* it was material and exculpatory, that would not be deemed cumulative.

IV. Conclusion

For the foregoing reasons, the convictions of Mr. Anderson, Dr. Robert LaHue, and Dr. Ronald LaHue are **AFFIRMED**.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

United States Of America,	)	Case Nos.
Plaintiff,	)	98-20030-01-JWL
	)	98-20030-03-JWL
v.	)	98-20030-04-JWL
	)	98-20030-06-JWL
Dan Anderson (01),	)	
Robert C. LaHue (03),	)	
Ronald H. LaHue (04),	)	
Dennis McClatchey (06),	)	
Defendants.	)	

MEMORANDUM AND ORDER

(Filed Jul. 21, 1999)

This matter is presently before the court on motions for acquittal, new trial, arrest of judgment, and dismissal (Docs. 423, 425, 426, 427, 428, 432) filed by the four defendants who were convicted of various Medicare fraud offenses by a jury following a nine week trial. Also before the court is the defendants' motion to compel production of the lengthy and detailed sentencing memo (Doc. 420) which the government provided ex parte to the District of Kansas probation officers involved in preparing the Pre-Sentence Investigation report in this case. The court has devoted countless hours to consideration of the arguments put forth in the parties' papers. It has carefully considered the factual and legal points addressed and has conducted its own thorough legal research. The questions presented are often difficult to resolve and some are exceedingly close calls. While most of the issues have been raised, litigated and decided by the court previously before and during trial, other matters are ripe

for in-depth consideration virtually for the first time at this stage of the case. In any event, the court is now prepared to rule.

For the reasons set forth below, the court grants Mr. McClatchey's motion for acquittal and, in the alternative,[1] for a new trial. The court also grants Ronald LaHue's motion for acquittal as to count eight. The remainder of the motions for acquittal, new trial, arrest of judgment, and dismissal, are denied. The defendants' motion for production of the government's sentencing memorandum is granted.

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[1] Mr. McClatchey's motion for new trial is granted conditionally pursuant to Fed. R. Crim. P. 29(d) ("If a motion for judgment of acquittal after verdict of guilty . . . is granted, the court shall also determine whether any motion for a new trial should be granted if the judgment of acquittal is thereafter vacated or reversed.").

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I. Background

A. Procedural History and Parties

On July 15, 1998, a grand jury returned a twelve-count superseding indictment charging seven defendants with conspiracy pursuant to 18 U.S.C. § 371 (count one). The indictment also charged each defendant with one or more substantive violations of the Medicare Anti-Kick-back Act pursuant to 42 U.S.C. § 1320a-7b(b) (counts two through ten). Two defendants were charged with false claims conspiracy pursuant to 18 U.S.C. § 286 (count eleven), and one defendant was charged with witness tampering pursuant to 18 U.S.C. § 1512 (count twelve).

Throughout this case, the court and the parties have placed the defendants into three distinct groups. One group, which the parties and the court have referred to generally as the doctor defendants, consists of two brothers, Drs. Robert and Ronald LaHue. The Drs. LaHue are osteopathic physicians, and were the longtime principals of a now-defunct organization called Blue Valley Medical Group ("BVMG"). BVMG was wholly owned by Robert LaHue, and Ronald LaHue was at all times a key employee. A second group, which the parties and the court have referred to generally as the hospital executive defendants, consists of Dan Anderson, Dennis McClatchey, and Ronald Keel. All of the hospital executive defendants worked for Baptist Medical Center ("Baptist"), a Kansas City, Missouri hospital. Dan Anderson was the President and Chief Executive Officer of Baptist, Dennis McClatchey was Senior Vice President and Chief Operating Officer, and Ronald Keel was a Vice President

whose responsibilities included monitoring the relationship between Baptist and BVMG. A third group, which the parties and the court have referred to generally as the lawyer defendants, consists of attorneys Ruth Lehr and Mark Thompson. Both attorneys represented Baptist at various times during the course of the alleged conspiracy.

In count one, the indictment alleged a conspiracy among all seven defendants to offer, pay, solicit, and receive remuneration in return for Medicare patient referrals at seven different hospitals in the Kansas City, Wichita, and St. Louis areas. The count one conspiracy allegedly involved all of the substantive conduct alleged in counts two through ten. Count two alleged substantive violations of the Medicare Anti-Kickback Act against the doctor defendants in connection with BVMG's relationship with Baptist. Count three alleged substantive violations of the Medicare Anti-Kickback Act against the hospital executive defendants and attorney Ruth Lehr in connection with Baptist's relationship with BVMG. Count four alleged similar conduct against attorney Mark Thompson. Counts five through ten alleged substantive violations of the Medicare Anti-Kickback Act against the Drs. LaHue in connection with St. Joseph Medical Center in Wichita, Deaconess Hospital in St. Louis, Bethany Medical Center in Kansas City, Kansas, Alexian Brothers Hospital in St. Louis, Liberty Hospital in Liberty, Missouri, and Olathe Medical Center in Olathe, Kansas, respectively. Count eleven alleged a false claims conspiracy against the Drs. LaHue in connection with their practices at BVMG. Count twelve alleged witness tampering against Robert LaHue.

Over the course of the nine week jury trial, portions of the indictment were pared away. Specifically, the court severed counts eleven and twelve, holding the counts improperly joined pursuant to Fed. R. Crim. P. 8(b). The court granted the doctor defendants' motion for acquittal as to count 10, involving Olathe Medical Center, on statute of limitations grounds. The court granted the lawyer defendants' motion for acquittal on all counts, holding the evidence to be such that no reasonable jury could conclude that the lawyer defendants had the criminal intent necessary to commit the crimes alleged. The court also held that as to the count one conspiracy charge, the evidence was such that no reasonable jury could conclude that the hospital executives and lawyers had any involvement with a conspiracy at hospitals other than Baptist. In the end, the case was submitted to the jury only on the Baptist conspiracy charged in count one, the substantive violations involving Baptist alleged in count two against the doctors and count three against the hospital executives, and the substantive violations against the doctors alleged in counts five through nine.

The jury convicted four of the five remaining defendants, finding specifically that the four were involved in a conspiracy at Baptist and that they committed the substantive anti-kickback violations with respect to Baptist alleged in counts two (Robert and Ronald LaHue) and three (Dan Anderson and Dennis McClatchey). The jury acquitted the fifth defendant, Ronald Keel, on all charges based on his statute of limitations defense.The jury convicted both LaHues on counts seven through nine, involving Bethany Medical Center, Alexian Brothers Hospital, and Liberty Hospital. The jury convicted Robert

LaHue and acquitted Ronald LaHue on counts five and six, involving St. Joseph Medical Center and Deaconess Hospital. Put another way, Dan Anderson and Dennis McClatchey, then, were convicted of counts one and three. Robert LaHue was convicted of counts one, two, and five through nine. Ronald LaHue was convicted of counts one, two, and seven through nine.

B. BVMG's Relationship with Baptist[2]

In the early 1980s, Drs. Robert and Ronald LaHue were associated with University Hospital, the teaching hospital formerly affiliated with the osteopathic school in Kansas City, Missouri. The LaHues had attended the school, and over time began sending patients to and treating patients in University Hospital. Both doctors were part-time faculty members.

The LaHues did not deliver their health care services in a traditional manner. Instead of operating out of a clinic, for example, the LaHues built their practice by treating patients in nursing homes. BVMG was the trade name under which the doctors practiced. By 1984, BVMG had a "census," or patient population, of approximately 2,500 nursing home patients in the Kansas City metropolitan area. The uncontroverted evidence at trial was that BVMG's large patient base was in substanital [sic] part due to the LaHues' willingness to go to nursing

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[2] In accordance with the applicable standards under Fed. R. Crim. P. 29 and 33, these facts are related in a light most favorable to the government.

homes to treat patients – serving a market that other doctors considered undesirable. Typically, the only care available to most nursing home patients from physicians involved costly ambulance rides to a hospital emergency room for acute care. Chronic ailments were often not addressed.

In approximately the Fall of 1984, the LaHues sought a teaching salary increase from University Hospital. The LaHues told University that if the hospital wasn't interested in increasing the salary, "they [the LaHues] would be no longer putting patients in our institution. They'd be moving them to Baptist." Tr. at 39. Ronald LaHue told University Hospital that the LaHues didn't want to be disloyal to the school, but "business is business." Tr. at 41. Robert LaHue told University Hospital that Baptist had offered to pay the LaHues $120,000 to $140,000 to move their patients. University Hospital refused to pay.

The LaHues' conversations with University Hospital occurred contemporaneously with discussions among Ronald Keel and others at Baptist about the possibility of entering an arrangement with the LaHues that was similar to the arrangement at University Hospital. Mr. Keel, who was a neighbor of Ronald LaHue, presented the idea initially to Mr. Anderson and later to the rest of the administrative staff, including Dennis McClatchey, to pay the doctors to affiliate with Baptist. Baptist considered various alternatives, including an outright purchase of BVMG. In the context of a preliminary proposal to purchase the medical laboratory operated by BVMG, Clem Fairchild, a well respected corporate attorney who was inexperienced in the complexities of healthcare law, drafted a proposed agreement that specifically linked the purchase of the laboratory with patient referrals. Mr.

Fairchild forwarded the proposal to Baptist CFO Gerald Probst,[3] and copied Mr. Anderson. Ruth Lehr vetoed the idea as a blatant violation of Medicare Fraud and Abuse law.

Rejecting the idea of a purchase for the time being, Baptist ultimately decided to enter an arrangement making the LaHues "Co-Directors of Gerontology" and paying them $75,000 per year each. When the LaHues began receiving their $75,000 annual payments from Baptist, BVMG referrals to University Hospital dropped dramatically and BVMG began referring large numbers of patients to Baptist. Although the formal contractual relationship between Baptist and the LaHues changed periodically over the next ten years in terms of the services the LaHues were scheduled to perform, the $75,000 annual payments continued unabated until approximately July 1994. Mr. Anderson directed the $75,000 payments, but although there is overwhelming evidence indicating Mr. McClatchey knew about the payments, there is no evidence he acted affirmatively to bring them about.

It is important to point out, too, that there was no evidence at trial that the referred patients received substandard care at Baptist. To the contrary, Baptist came to be widely recognized as a premier provider of gerontology services. There was also no evidence at trial that the

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[3] Mr. Probst testified for the government at trial under a grant of immunity.

referral relationship affected patient choice. To the contrary, where patients or their families expressed a hospital preference, BVMG worked to honor the request. There was, moreover, no evidence at trial that any patient received unnecessary services. To the contrary, witness after witness testified that the BVMG/Baptist patient referral system had appropriate checks and balances to guard against such abuses.

In the mid 1980s, about the time Baptist's relationship with BVMG began, the Medicare system changed the way it reimbursed hospitals for inpatient services. Previously, Medicare reimbursed hospitals for the actual cost of providing medical services. In an effort to curtail rising costs, however, Medicare implemented a system of payment based on Diagnostic Related Groups, or DRGs. Under the DRG system, Medicare reimbursed hospitals for particular diagnoses, irrespective of how much the hospital spent to care for the patient. The DRG system, plus competition in the Kansas City health care market, created a need for Baptist to fill its inpatient beds. Defendant Anderson was concerned about filling the beds by keeping admissions up. Admissions from BVMG helped Baptist fill its market-based need.

On January 9, 1985, Mr. McClatchey reported to the hospital's department directors that BVMG had named Baptist as its "hospital of choice." He reported that BVMG represented approximately 3,500 nursing home beds, and explained the hospital's plans for how to deal with the influx of elderly patients. At a hospital Board of Trustees meeting on March 21, 1985, Mr. Anderson, after reporting on the hospital's decision not to purchase any part of BVMG, reported the LaHue management services

arrangement and reported to the hospital Board of Trustees that "[d]uring the first two and one-half months of operation the Blue Valley Medical Group has admitted 145 patients to the hospital, and outpatient business is steadily growing."

At some point in the summer of 1985, the LaHues approached Mr. Anderson seeking help in managing their practice. The LaHues suggested that Baptist employee Tom Eckard, essentially a marketing specialist with whom the LaHues were familiar, be assigned to help them organize their practice. Mr. Anderson agreed, and Mr. Eckard became "Director of Geriatric Services." Mr. Eckard described his job as "liaison function between Baptist Medical Center and Blue Valley Medical Group."[4] Tr. at 4346. Based on his discussions with Mr. Anderson, Mr. McClatchey, and Mr. Keel, Mr. Eckard understood his primary job duty was to "maintain the relationship with Blue Valley Medical Group on behalf of Baptist Medical Center in order to assure that the flow of patients to the hospital would continue." Tr. at 4346. Mr. Eckard, of course, also assisted BVMG with organizational matters, which was not a strength of the LaHues. Ms. Lehr originally drafted an agreement whereby BVMG would pay Baptist for Mr. Eckard's services, but the LaHues balked, and no payments were made. In effect, although Baptist derived considerable benefit from Mr. Eckard's placement with BVMG because Mr. Eckard helped streamline the patient flow, Baptist was loaning BVMG an employee for

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[4] Mr. Eckard testified for the government pursuant to a plea agreement.

free. The Eckard arrangement continued from mid-1985 until 1993.

There were problems with the Gerontology Directorship arrangement,[5] so Mr. Keel asked Ms. Lehr to evaluate the possibility of entering a consulting arrangement with the LaHues. Ms. Lehr advised against such an arrangement because it involved potential Medicare Fraud and Abuse concerns. She advised Mr. Keel, with copies to Mr. Anderson and Mr. McClatchey, that a consulting arrangement was acceptable only if "the Drs. LaHue . . . perform valid services for [Baptist], regardless of the label used to describe those services, and the compensation must be reasonable." Mr. Keel and Ms. Lehr explored "other types of compensation arrangements," including an option to purchase and a structured buy-out.

Baptist decided to pursue entering into a consulting relationship with the LaHues. On January 7, 1986, Mr. Keel recommended modifying the Gerontology Directorship agreement to reflect accurately the services the LaHues were providing to Baptist.[6] He also recommended reducing the annual payments to the LaHues from $75,000 each to $50,000 each, apparently because the

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[5] There was concern that the arrangement violated the hospital's by-laws because the LaHues were not eligible for hospital staff membership.

[6] Mr. Eckard described the services the LaHues were performing pursuant to the agreement as "minimal to none." Tr. at 4404. He further testified that Baptist did not attempt to collect reimbursement for the services required but not performed. Tr. at 4407-08.

Adult Health Care system at Baptist was now up and running and the hospital no longer needed the same level of service from the LaHues. Mr. Anderson okayed the recommendation for accurately specifying the LaHues' services, but wanted to "discuss" Mr. Keel's recommendation to reduce the fees. The fees were never reduced. Mr. McClatchey was copied on Mr. Keel's written recommendations, but there is no evidence he took part in or knew about the subsequent fee discussion or why the fees were not reduced.

Mr. Keel consulted with Mr. Eckard to identify services the LaHues could perform pursuant to the consulting contract. Ms. Lehr drafted the resulting agreement. Mr. McClatchey was copied on letters explaining the modifications to the contract, and he was "aware and involved in contract development." Govt. Ex. 68. Mr. Anderson and both Drs. LaHue signed the revised contract, which called for the LaHues to perform specified consulting services both within the hospital and outside the hospital, in nursing homes.

The Drs. LaHue actually performed only minimal services under the contract. In March of 1987, Deb Grimes, a Baptist employee involved with the gerontology program, informed Mr. McClatchey that the LaHues were not performing the functions set forth in the consulting agreement, except for attending the quarterly Adult Health Care staff meetings. Ms. Grimes met with Mr. McClatchey, who said he would "take care of it." Tr. at 7831. Mr. McClatchey directed hospital staff to "round" with the LaHues as specified in the contract, and those rounds immediately began. The evidence was undisputed, in any event, that Mr. McClatchey did not have

day-to-day responsibility to monitor contract compliance. Mr. Eckard testified that Mr. McClatchey, when notified about contract compliance problems, made efforts to ensure compliance, but that the compliance within the hospital eventually tapered off because of resistance among hospital staff.The hospital front-line staff apparently had little interest in interacting with the LaHues.[7]

Also in 1987, some executives at Baptist began to realize that Mr. Eckard's allegiances were not entirely with Baptist and that the arrangement might have private inurement ramifications under federal tax law. In light of these concerns, Mr. McClatchey and Mr. Probst recommended to Mr. Anderson that Mr. Eckard be terminated. Mr. Anderson declined. Mr. Anderson "had an understanding that the physicians weren't in a position to employ Mr. Eckard, 'cause of financial reasons or concerns', and had a concern relative to that recommendation and proceeding with it in that it would disrupt or create a problem with the relationship between the Medical Center and [BVMG] or, specifically, the physicians." Tr. at 1208 (Probst).

By early 1991, Baptist was involved in merger discussions with other hospitals in the Kansas City area. These

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[7] Mr. Eckard testified, "In questions to Mr. Keel and Mr. McClatchey, primarily where I kept asking why there wasn't more pressure put on the departments . . . to allow lectures or consulting to occur or why rounds weren't continuing to be done in the nursing homes [by hospital nurses], I was given the impression that – that it had been tried but there wasn't a lot of interest there, and that the pressure was going to be taken off or had been taken off and basically met with resistance and decided not to continue to push for it." Tr. at 5570.

discussions eventually resulted in a merger whereby Baptist became a subsidiary of a corporation called Health Midwest. In connection with the merger, attorney Mark Thompson reviewed Baptist's physician contracts, and identified the BVMG relationship as a problem area. After speaking about the relationship with Ms. Lehr, Mr. Thompson reported in a January 30, 1991 due diligence memo that "the history of the negotiation over this contract causes [Ms. Lehr] to wonder if the services called for are in fact being rendered. . . . [I]t may be a good idea to discuss with Baptist management whether the services called for in the contract are in fact being rendered and whether this is backed up by evidence in Baptist's files." Govt. Ex. 129. He also reported Ms. Lehr's feeling that "if these services are in fact being rendered as provided in the contract, then the $75,000 fee paid to each of them is fair compensation." *Id.*

In the summer of 1991, Mr. Keel proposed a change in the 1986 contract. The hospital had learned that Mr. Eckard was involved in helping the LaHues market their "system" to other hospitals in Kansas City and to hospitals in Wichita and St. Louis. In response, Mr. Keel suggested that Mr. Eckard no longer be employed by Baptist, that the contract be modified to explicitly direct patients to hospitals within specified postal zip codes, and that the hospital increase the amount of fees paid to the LaHues by $70,000, which was the approximate amount of Mr. Eckard's salary at the time. Mr. Keel directed his suggestions to Mr. McClatchey, who forwarded them to the hospital's lawyers. The hospital did not adopt the recommendations.

In August of 1991, Mr. Thompson informed Mr. Keel, with copies to Mr. McClatchey and Mr. Anderson, that the 1986 agreement did not meet the Anti-Kickback Act safe harbor regulations. Mr. Thompson recommended making good faith efforts to bring the contract into compliance with the safe harbor regulations, which would have required a clause specifying intervals of service and the rate to be charged per interval and more extensive documentation that the services specified were actually being performed. Mr. Thompson also indicated, however, that the services which were specified in the existing contract to be rendered by the LaHues "appear to be substantial."

The parties set out to draft a new contract, and negotiations went back and forth. Mr. Keel left Baptist in late 1991,[8] and responsibility for contract negotiation fell into the lap of Baptist Vice President Kevin McGrath, who reported directly to Mr. McClatchey.[9] Robert LaHue told Mr. McGrath that the doctors "were having difficulties in performing some of the services that were delineated in the contract." Tr. at 2753. Mr. McGrath shared that information with Mr. Anderson and Mr. McClatchey. Mr. McClatchey was surprised to learn the information, and directed Mr. McGrath to check out the problem and report back.

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[8] Mr. Keel was ultimately acquitted because the jury found he withdrew from the alleged conspiracy when he left Baptist in late 1991, prior to the critical date for statute of limitations purposes.

[9] Mr. McGrath testified for the government under a grant of immunity.

The parties, including Mr. McClatchey, Mr. McGrath, Mr. Thompson, the Drs. LaHue, and Mr. Eckard, went through numerous contract drafts and revisions, all drafted and reviewed by Mr. Thompson. In one draft agreement, Mr. McClatchey highlighted an area he believed ought not to be part of the agreement because he was concerned the services would not occur. On November 4, 1992, Mr. Eckard forwarded Mr. McGrath a list of job duties from Robert LaHue. Mr. McGrath forwarded the list to Mr. McClatchey, calling it "not very complete."

On November 5, 1992, the FBI appeared at Baptist to interview Mr. McClatchey and Mr. Anderson concerning the hospital's relationship with BVMG, specifically seeking information about the consulting fees and the Eckard arrangement. Immediately following the FBI visit, Baptist employed attorneys from Baltimore specializing in civil and criminal health care fraud cases. *See United States v. Anderson*, ___ F. Supp. 2d ___, No. 99-MC-205, -207, 1999 WL 412313 (D. Kan. May 7, 1999) (government violated the Baltimore attorneys' due process rights by publicly labeling them as unindicted coconspirators in pretrial documents). In a November 11, 1992 meeting, the Baltimore attorneys recommended documenting actual performance of consulting duties. Such a move, according to Baltimore counsel, would move the contract issue "out of the criminal arena and into the civil side." Govt. Ex. 182A. The parties at the meeting agreed to change the consulting relationship to a new part-time employment contract which more accurately described the services that were actually being performed. The Baltimore attorneys were even more pointed with respect to the Eckard

arrangement. The group decided that, "as quickly as possible, we need to get [Mr. Eckard] off the Baptist payroll and onto the payroll at Blue Valley Medical Group." *Id.*

Health Midwest attorney Gina Kaiser testified that it was Mr. McClatchey's responsibility to fix the Eckard arrangement. The LaHues initially were unresponsive to the hospital's demands, but agreed to come to the table to discuss modifying the arrangement after the hospital gave them an ultimatum date. When BVMG finally came to the table, there were a series of meetings among Robert LaHue, Mr. McClatchey, and Mr. Thompson. It became clear that BVMG had no intention of putting Mr. Eckard on its payroll, so Mr. McClatchey decided to bring Mr. Eckard back to Baptist effective March 1, 1993.

At least initially, Mr. McClatchey seemed reluctant to cut all ties between Mr. Eckard and BVMG. In early February 1993, as the parties were hammering out the specifics of Mr. Eckard's return, he asked Mr. Thompson whether it would be appropriate to send Mr. Eckard on site at BVMG from time to time. Also in this prereturn-to-Baptist time frame, Mr. McClatchey asked Mr. Eckard to "list what my being pulled out of Blue Valley Medical Group would mean in terms of lost service or things that the practice – Dr. Bob LaHue was getting from me that he would no longer be getting." Tr. at 4517. Mr. Eckard testified that Mr. McClatchey was "concerned about the negative impact my removal from the Blue Valley practice would have on the relationship with Blue Valley Medical Group." Tr. at 4518.

On an early February draft of Mr. Eckard's new written job description, Mr. Eckard reassured Mr. McClatchey

that "Bob LaHue sees [the proposed new relationship] as 'no real change.' " Govt. Ex. 204. The job requirements included Mr. Eckard marketing Baptist services to nursing homes who, he reported, saw him as "BVMG's Administrator." *Id.* Mr. Eckard testified that the proposed job description differed from what he was doing previously in that "[i]t was more Baptist oriented and less specifically Blue Valley Medical Group oriented." Tr. at 4519. Nonetheless, it did involve some duties related to BVMG. At least according to Mr. Eckard, his purpose after the change remained "[t]o maintain the relationship between the Blue Valley Medical Group and the hospital in order to assure the continued flow of patients." Mr. Eckard did not, however, go so far as to say that Mr. McClatchey or anyone else so instructed him or was aware that he saw his job in that light.

In this vein, it is important to note that there was overwhelming evidence at trial indicating that Mr. Eckard, unbeknownst to the hospital administrators, engaged in self-dealing efforts which had the effect of promoting BVMG's interests over Baptist's. He surreptitiously negotiated with Robert LaHue to obtain 10 percent commissions on all new consulting fee business (i.e. with non-Baptist hospitals), and also negotiated a car allowance with BVMG despite Mr. Keel's explicit instruction that he not do so. Even after Mr. Eckard returned to Baptist, there was evidence that he took steps to conceal his BVMG-related activities from the Baptist administrators. He continued corresponding with other hospitals on behalf of BVMG without informing anyone at Baptist.

The February 12, 1993 final draft of Mr. Eckard's new job description differed from the early February proposal

in that it omitted any reference to any work with BVMG, and instead involved marketing efforts with "area Long Term Care Physicians." Govt. Ex. 205. The duties under that portion of the job description, however, were markedly similar to the duties in the previous draft that explicitly related to BVMG. Mr. Thompson reported to Baltimore counsel that he and Mr. McClatchey planned to emphasize to Robert LaHue in a February 15 meeting "that the new job description replaces the old one and that nothing in the new description implies any services to the LaHues in their practice." *Id.*

True to Mr. Thompson's word, Mr. McClatchey suggested a laudable alternative solution at the February 15 meeting. Despite his earlier inquiries of Mr. Thompson and Mr. Eckard concerning how to let Mr. Eckard continue to be a free benefit to BVMG, Mr. McClatchey proposed a new alternative – having BVMG pay Baptist for Mr. Eckard's services. Dr. LaHue apparently declined. Also during these meetings, Dr. LaHue asked Baptist to purchase BVMG, increase BVMG's annual take, or base the fees paid on a per patient basis. Baptist refused. Mr. Eckard returned to full-time hospital duties as of March 1, 1993.

Mr. Anderson and the LaHues finally executed a new agreement, titled a "Medical Group Services Agreement," on April 1, 1993. The agreement contained at least some of the services that had been identified as areas of nonperformance in the past.

Mr. Eckard left Baptist in September 1993 to pursue his own start-up business which he intended to compete with BVMG. Mr. McClatchey left Baptist in October 1993

to begin an unrelated employment position with Health Midwest.

On November 26, 1993, Robert LaHue wrote a letter of termination to Mr. Anderson. Pursuant to the terms of the agreement and the letter, the agreement was to terminate as of February 28, 1994 because of a proposed sale of BVMG to Vencor, an entity unrelated either to Baptist or BVMG. After receiving the letter, Mr. Anderson worked to develop a strategy to replace the BVMG patients, but did nothing to replace the LaHues' consulting services. Baptist began quiet efforts to compete with BVMG for control of nursing home beds.

The Vencor sale fell through. The parties entered another agreement dated March 1, 1994 that listed the same, but fewer, contractual duties for the LaHues to perform. This agreement was to last only for three months. Later in March, Ronald LaHue met with Mr. McGrath to discuss Baptist's efforts to compete with BVMG for nursing home patients, which the LaHues apparently had begun to perceive. Dr. LaHue told Mr. McGrath that BVMG "feels they have value in the 2,000 nursing home beds they control. They wish to work out any arrangement with Health Midwest that pays them for this value." Govt. Ex. 232. Later, on March 18, 1994, Dr. LaHue proposed a "sale" of approximately 2,300 nursing home beds in the Kansas City area for $2,500,000 and future employment. Baptist refused. Discussions to save the relationship continued until January 1995, when the relationship finally ended.

C. Laboratory and Other Relationships Between Baptist and BVMG

Effective June 1, 1986, BVMG and Baptist formalized a laboratory services agreement. Under the agreement, BVMG collected specimens, and Baptist performed necessary lab testing. BVMG billed Medicare, and split the net revenues with Baptist on a fifty-fifty basis. The agreement was renewed in 1988, but the allocation was split to allow BVMG to collect nearly two-thirds of the revenues. Under the agreement, it was BVMG's responsibility to collect all receivables. Mr. McClatchey signed the 1988 renewal agreement.

In 1986, BVMG fell behind in collecting the receivables. Tom Eckard proposed an idea to Baptist whereby Baptist would hire a temporary employee to bring the lab up to date in its billing practices. Mr. Eckard sold his idea to Mr. Keel (who apparently obtained Mr. McClatchey's approval) by arguing that BVMG had little interest in collecting the receivables in a timely manner and the hospital needed to shore up its accounting for those receivables. The project resulted in a nice net income for the hospital.

In the early 1990s in response to new regulations from Congress relating to lab referrals, BVMG needed to restructure its lab arrangement. Mr. Keel recommended, and Mr. Anderson approved, the loan of an employee to BVMG to bring the lab "up to speed." Mr. McClatchey knew about the arrangement but there is no evidence he acted to bring it about.

In 1990, the LaHues approached Mr. Keel about Baptist helping them solicit nursing home referrals from Baptist patients who were in need of nursing home care but otherwise unassigned to any specific nursing home. Mr. Keel implemented this idea with other hospital staff after informing Mr. McClatchey and Mr. Anderson of the plan.

In early 1991, the LaHues asked Baptist for a loan to cover payroll. Mr. McClatchey asked Mr. McGrath to work with Mr. Thompson on documenting a $100,000 line of credit. Mr. Thompson drew up the documents, but the LaHues never drew on the line of credit. There is no evidence that Mr. McClatchey did not intend any loan which might have been made to be repaid.

In 1992, the LaHues asked Baptist to take over the lease of certain office space. Baptist agreed, and began making lease payments as of September, 1992. Mr. McClatchey knew about this arrangement, but it was negotiated by Mr. McGrath and documented by Mr. Thompson. It constituted a beneficial business arrangement from Baptist's perspective, allowing Baptist to aquire [sic] needed space at a favorable rate.

D. BVMG's Relationship with Other Hospitals

1. St. Joseph Medical Center

Beginning in the summer of 1988, and continuing through November of 1989, Robert LaHue and Tom

Eckard, acting for and on behalf of BVMG,[10] negotiated an agreement with St. Joseph Medical Center whereby BVMG would refer Medicare eligible patients to St. Joseph Hospital for an ostensible consulting fee. The solicitation was Robert LaHue's idea. The 1988 proposal discussed at the hospital explicitly states that BVMG will refer all its Wichita patients to St. Joseph Hospital. The consulting services outlined in the final version of the contract were similar to the consulting services listed in the Baptist consulting contracts. BVMG did only minimal consulting, and any consulting that was done was done by Tom Eckard – not BVMG. The only benefit to the hospital from the arrangement was the referrals because the services listed were for the benefit of BVMG's nursing home patients, not the hospital. St. Joseph Medical Center paid BVMG $50,000 per year at first, and the amount increased to $100,000 per year in 1992 when BVMG's Wichita patient census had grown substantially.

2. Deaconess Hospital

Beginning in May 1989 and continuing through February 1990, Robert LaHue and Tom Eckard, acting on behalf of BVMG, negotiated an arrangement with Deaconess Hospital whereby BVMG would refer Medicare eligible patients to Deaconess Hospital in return for an

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[10] As referenced above, Mr. Eckard had arranged with BVMG to collect a 10% commission on any new consulting fee business. Baptist personnel were unaware of this arrangement.

ostensible consulting fee. This agreement, like the agreement at St. Joseph Medical Center, provided that Deaconess Hospital would pay $50,000 per year to BVMG. Witnesses testified that despite the consulting services required of BVMG in the agreement, Deaconess Hospital did not need any expertise from BVMG to take care of elderly patients at Deaconess Hospital. BVMG sent Deaconess Hospital patients – nothing more.

3. Bethany Medical Center

Beginning in April 1991 and continuing through May 1991, Tom Eckard and Dr. Chris Murray, acting on behalf of BVMG, on the recommendation of Ronald LaHue, negotiated an agreement with Bethany Medical Center whereby BVMG would refer Medicare eligible patients to Bethany Medical Center in return for an ostensible consulting fee. The solicitation at Bethany Medical Center occurred with the approval of Robert LaHue. When the three BVMG doctors primarily responsible for nursing homes in Bethany Medical Center's area jumped from BVMG to Tom Eckard's new startup business in 1994, Ronald LaHue attempted to reassure Bethany that BVMG would nonetheless send patients. From May 1992 through September 1994, Bethany Medical Center paid BVMG over $169,000.

4. Alexian Brothers Hospital

Beginning in January 1992 and continuing through October 1, 1992, Robert LaHue and Tom Eckard negotiated an agreement with Alexian Brothers Hospital

whereby BVMG would refer Medicare eligible patients in return for an ostensible consulting fee. The arrangement here was similar in substance to the arrangements at the other non-Baptist hospitals. Alexian Brothers Hospital paid approximately $190,000 to BVMG during the relationship.

5. Liberty Hospital

At a meeting with Liberty Hospital executives at which Tom Eckard and Robert and Ronald LaHue were all present, BVMG proposed a contract whereby BVMG would be paid for services Liberty was already performing on its own. According to at least one witness at the meeting, "Blue Valley Medical Group approached [Liberty CEO] Joe Crossett about a possible fee in exchange for the patient referrals that they sent." Tr. at 2189. Liberty refused the offer.

II. Motions for Acquittal

Each defendant seeks acquittal pursuant to Fed. R. Crim. P. 29. Specifically, each defendant asserts that the government's proof was insufficient, as to him, to establish the mens rea element of the charged crimes. Each defendant also asserts that the government's proof fell short of proving the unlawful inducement element of an Anti-Kickback Act violation. The court denies the motions of Mr. Anderson and Robert LaHue because the evidence is sufficient for a reasonable jury to have convicted them beyond a reasonable doubt. The court grants the motion of Mr. McClatchey, because, although the evidence appears close upon first glance, it is upon closer

review insufficient to support a jury finding beyond a reasonable doubt on the element of intent. The court grants the motion of Ronald Lahue [sic] as to count eight but denies the motion with respect to all other counts.

A. Standard

A motion for judgment of acquittal challenges the sufficiency of the evidence. *United States v. Urena*, 27 F.3d 1487, 1490 (10th Cir. 1994). In deference to the jury's finding of guilt, the court must view the evidence in a light most favorable to the government. *United States v. Valadez-Gallegos*, 162 F.3d 1256, 1262 (10th Cir. 1998). The court must then determine whether there is substantial evidence to support a verdict of guilt beyond a reasonable doubt. *Id.* To support a conviction the evidence must do more than simply raise a suspicion of guilt; the evidence must be substantial. *United States v. Taylor*, 113 F.3d 1136, 1144 (10th Cir. 1997). The jury, as fact finder, is entitled to consider both direct and circumstantial evidence, as well as all reasonable inferences therefrom. *United States v. Hooks*, 780 F.2d 1526, 1531 (10th Cir. 1986). "Even though rational jurors may believe in the likelihood of the defendants' guilt, . . . they may not convict on that belief alone." *United States v. Jones*, 49 F.3d 628, 632 (10th Cir. 1995).

As it relates to Drs. Robert and Ronald LaHue, the Anti-Kickback Act provides in pertinent part:

> Whoever knowingly and willfully solicits or receives any remuneration . . . in return for referring an individual to a person for the furnishing . . . of any . . . service for which payment

> may be made . . . under [Medicare] shall be guilty of a felony. . . .

42 U.S.C. § 1320a-7b(b)(1). As it relates to Dan Anderson and Dennis McClatchey, the Anti-Kickback Act provides in pertinent part:

> Whoever knowingly and willfully offers or pays any remuneration . . . to any person to induce such person – to refer an individual . . . for the furnishing . . . of any . . . service for which payment may be made . . . under [Medicare] shall be guilty of a felony. . . .

42 U.S.C. § 1320a-7b(b)(2).

The "willfully" language in the Anti-Kickback Act incorporates a heightened mens rea element. Pursuant to the court's instructions,

> An act is done willfully if it is done voluntarily and purposely and with the specific intent to do something the law forbids, that is, with the bad purpose either to disobey or disregard the law. A person acts willfully if he or she acts unjustifiably and wrongly while knowing that his or her actions are unjustifiable and wrong. Thus, in order to act willfully as I have defined that term, a person must specifically intend to do something the law forbids, purposely intending to violate the law.

Instruction No. 36; *see also United States v. Jain*, 93 F.3d 436, 440-41 (8th Cir. 1996). The conspiracy charges require an identical degree of criminal intent. *See United States v. Jones*, 808 F.2d 754, 755 (10th Cir. 1987).

B. Robert and Ronald LaHue

There is ample evidence to support the inference that both Robert LaHue and Ronald LaHue acted with a bad purpose, specifically intending to violate the Anti-Kickback Act at Baptist Hospital. From the beginning of BVMG's relationship at Baptist – the very first conversation over the neighborhood fence between Ron Keel and Ronald LaHue – the relationship between BVMG and Baptist was about patients and what Baptist would have to do for the LaHues in order to obtain referrals. Immediately when Baptist began paying the LaHues $150,000 per year, BVMG's patient referrals to University Hospital came to a virtual halt and Robert and Ronald LaHue each began referring massive numbers of patients to Baptist. This happened immediately after Ronald LaHue told University Hospital representatives that "business is business" and Robert LaHue told University Hospital that Baptist had offered them a large sum to move their patients.

Witness after witness testified that the LaHues performed very few actual services in return for the substantial annual sum they were paid. Mr. Eckard described the services performed by the LaHues as "minimal to none." Although the LaHues did provide some services under the contracts, many of the services specified in the contracts were services related to care of their own patients.

In connection with the February 1993 meetings to fix the Eckard employment arrangement, Robert LaHue out and out asked Baptist to base the LaHues' fees on a per patient basis. In connection with the 1994 meetings after the failed Vencor sale, Ronald LaHue told Kevin McGrath

that BVMG "feels they have value in the 2,000 nursing home beds they control. They wish to work out *any arrangement* with Health Midwest that pays them for this value." (emphasis added).

A reasonable jury could conclude from this evidence that the LaHues solicited and received considerable sums of money from Baptist, intending to be influenced by that money in their patient referral decisions. *See* Instruction No. 33. In light of the ample evidence that the LaHues knew that such patient referral schemes are illegal, there was easily enough evidence for a rational jury to convict them of conspiracy and substantive violations of the Anti-Kickback Act at Baptist beyond a reasonable doubt.

Similarly, there was ample evidence to convict Robert LaHue of substantive violations of the Anti-Kickback Act at St. Joseph Medical Center. The solicitation at St. Joseph was Robert LaHue's idea. BVMG did only minimal consulting under the arrangement, and any consulting that was done was done by Mr. Eckard. BVMG referred its patients to St. Joseph, and was paid a substantial sum.

There was ample evidence to convict Robert LaHue of substantive violations of the Anti-Kickback Act at Deaconess Hospital. Robert LaHue negotiated the familiar consulting-fee-type arrangement with Deaconess, who, witnesses testified, did not need any consulting expertise in the geriatric field. In return for $50,000 per year, BVMG sent Deaconess patients and nothing more.

There was ample evidence to convict Robert and Ronald LaHue of substantive violations of the Anti-Kickback Act at Bethany Medical Center and Liberty Hospital. Ronald LaHue suggested BVMG solicit Bethany, and

Robert LaHue approved the suggestion. Bethany paid BVMG, Robert's corporation, over $169,000. BVMG sent Bethany patients. When there was a threat to the patient numbers, Ronald attempted to reassure Bethany that BVMG would nonetheless continue to send patients. Robert and Ronald together solicited Liberty Hospital "about a possible fee in exchange for the patient referrals that they sent."

There was ample evidence to convict Robert LaHue of substantive violations of the Anti-Kickback Act at Alexian Brothers Hospital. Robert LaHue negotiated the familiar consulting agreement, whereby Alexian Brothers paid BVMG approximately $190,000. BVMG did little or no consulting at Alexian Brothers. Moreover, the overwhelming evidence of Robert LaHue's intent to be influenced in his patient referral decisions at the other hospitals is sufficient to support an inference that he had similar intentions with respect to Alexian Brothers. *See* Fed. R. Evid. 404(b).

Despite the court's ruling at trial to the contrary, however, the evidence was insufficient to support a conviction of Ronald LaHue for principal or aider and abettor liability at Alexian Brothers Hospital. In order to support conviction under an aider and abettor theory, the government needed to prove that Ronald LaHue "knowingly did some act for the purpose of furthering the commission of that particular crime." Instruction No. 35. The only evidence specifically connecting Ronald LaHue with the arrangement at Alexian Brothers Hospital is the equivocal testimony of Mr. Eckard, Ronald's presence at Alexian Brothers Hospital on one occasion, and the appearance of Ronald's name as a copied recipient on

three Alexian Brothers-related documents. Mr. Eckard testified that he discussed the idea to solicit Alexian Brothers with Ronald LaHue and that he "believe[d]" that Ronald approved of the solicitation. Tr. at 4654. This testimony does nothing to show that Ronald did some affirmative act to further the crime because Mr. Eckard's mere belief that Ronald approved is insufficient to show beyond a reasonable doubt that Ronald affirmatively approved. Mr. Eckard also testified, in the context of broad government questions related to the solicitation of all the non-Baptist hospitals as a group, that both Drs. LaHue were "involved in" these relationships. Tr. at 4351. This evidence is too equivocal to support more than a suspicion of guilt because the question and response were too broad; Ronald LaHue was clearly involved in the relationships at Bethany and Liberty and Robert was clearly involved in the relationships with all the non-Baptist hospitals. Ronald's presence at Alexian on one occasion does nothing to support conviction because there is nothing unusual about a doctor appearing in a hospital, and there is no evidence explaining why he was there. *See United States v. Jones*, 44 F.3d 860, 869 (10th Cir. 1995) ("The government must prove, through direct or circumstantial evidence, more than mere presence at the scene of the crime even if coupled with knowledge that the crime is being committed."). The three Alexian Brothers-related documents which mention Ronald LaHue, Govt Exs. 802, 815, and 819, merely list Ronald as a document recipient and do nothing to show that he acted affirmatively to further the Alexian Brothers/ BVMG relationship. Accordingly, the court grants Ronald LaHue's motion for acquittal as to count eight. *See United*

States v. Bindley, 157 F.3d 1235, 1238 (10th Cir. 1998) (quoting *United States v. Jones*, 44 F.3d 860, 869 (10th Cir. 1995) ("To be guilty of aiding and abetting, a defendant must willfully associate with the criminal venture and aid such venture through affirmative action.")).

C. Dan Anderson

The court denies Mr. Anderson's motion for acquittal because the evidence at trial was sufficient for a reasonable jury to conclude he willfully violated and conspired to violate the Anti-Kickback Act. From the beginning of the BVMG/Baptist relationship, Mr. Anderson understood Baptist's relationship with the LaHues to be centered around patient referrals and what Baptist would have to do to acquire them. The relationship began when Mr. Anderson agreed in principle to pay the LaHues to associate with Baptist. Only after the fee was set did the parties begin attempts to justify the fee. Shortly thereafter, Mr. Anderson approved the LaHues' request to assign Tom Eckard to their practice.

Without more, however, the mere chronology of events (i.e. patients following remuneration) is insufficient to infer that Mr. Anderson "purposely intended to violate the law." What makes the Baptist situation different from the relationships between the other hospitals and BVMG is that Baptist endeavored to involve legal counsel much more extensively in an effort to effectuate the relationship, and those lawyers attempted to put it on a legal footing. As the court recognized in granting the lawyer defendants' motions for acquittal at the close of the government's evidence, and which is applicable as

well to the starting point in evaluating the evidence of culpability of the hospital executive defendants,

> It is undisputed from the evidence that all the lawyers who dealt with or reviewed these transactions . . . held good faith beliefs that it was possible to facilitate some business relationship that was legal between the hospitals and BVMG. Even if patient referrals were devoutly hoped for and anticipated; even if the volume of patients could be large; even if the parties might never have come together but for Baptist having embarked on a long range plan that depended on attracting nursing home patients, there is nothing in the evidence or the law that would have a priori precluded a legal relationship from being entered into under these circumstances.
>
> The problem here is that a very simple concept, "payment for patients is illegal," became far from simple as Congress, the Executive Branch, and the Courts got more deeply involved. "Remuneration to induce" language invites judicial interpretation as to what these words mean – indeed, the government in this case adamantly maintains that the words require definition as part of the jury instructions. Judicial catch phrases like "one purpose rule" [*see United States v. Greber*, 760 F.2d 68, 69 (3d Cir. 1985)] or "primary purpose rule," the reversals of field by the OIG concerning its own interpretation, the checkered history of the *Hanlester* [*Network v. Shalala*, 51 F.3d 1390 (9th Cir. 1995)] case and the reservation by Congress of a safe harbor provision in the act (the promulgation of regulations concerning which were delayed for a considerable time) all invite lawyers to attempt to devise legal ways for parties to have

> a relationship which has as a component hoped-for and anticipated referrals. . . .
>
> There were no decisions from the U.S. Supreme Court or from the Eighth or Tenth Circuits, where the activities in question were going on, to guide them. What the evidence unassailably demonstrated is that [the lawyers] steadfastly maintained to their clients that if fair market value were paid for the doctors' practice or for legitimate consulting services, the relationship passed legal scrutiny. Nothing in the evidence or the law suggests otherwise.

Tr. at 7342-45. The court must examine, therefore, whether Mr. Anderson's actions demonstrate that he caused Baptist to pay more than fair market value for consulting services, whether he knew the consulting services were illegitimate, and whether he knew they were not sufficiently being performed.

The government's evidence is sufficient to show that Mr. Anderson knew the payments he directed were more than fair market value for consulting services, that the services specified ultimately proved to be not entirely bona fide, and that the services specified were not sufficiently being performed. When Mr. Keel recommended modifying the relationship in January of 1986 to reduce the amount of fees paid and accurately specify services to be provided, Mr. Anderson approved the latter recommendation but raised questions about the former. The fees were not reduced. A jury could infer from this evidence that Mr. Anderson refused to reduce the fees even when faced with information that the specified consulting services were not being performed. When Mr. Probst and Mr. McClatchey recommended in 1987 that Mr. Eckard be

terminated for tax reasons and because his allegiances were beginning to shift, Mr. Anderson rejected the recommendation because he was concerned that firing Mr. Eckard would "disrupt or create a problem with the relationship between Baptist Medical Center and [BVMG]." A jury could infer from this evidence that Mr. Anderson cared little whether Mr. Eckard performed duties for the hospital as long as the patients kept coming. In 1991, Mr. Thompson informed Mr. Anderson that the 1986 agreement did not conform with safe-harbor regulations, but could be brought into compliance if the contract were written to require hourly services at a specified rate and if Baptist undertook to extensively document the services actually being performed. Neither of these recommendations were implemented. Mr. Anderson later learned that the LaHues were having difficulty performing some of the services delineated, but Mr. Anderson made no efforts to limit or end the consulting fees he himself had directed. A jury could infer from Mr. Anderson's repeated "torpedoes be damned" attitude toward paying the annual fees, which he personally directed be paid, that he placed little value on the LaHues' consulting and instead cared only about patient referrals.

The most inculpatory evidence as to Mr. Anderson falls near the end of the Baptist/BVMG relationship. After receiving BVMG's termination letter prior to the anticipated BVMG sale to Vencor, Mr. Anderson worked to develop a strategy to replace the BVMG patients but did nothing to replace the LaHues' consulting services. Again, a jury could infer from this evidence that Mr.

Anderson placed little value on the consulting services and instead valued BVMG's patients.

D. Dennis McClatchey

The question of whether there is sufficient evidence to support a finding that Mr. McClatchey joined a conspiracy specifically intending to do something the law forbids, purposely intending to violate the law, initially appears close because of his acknowledged association with the other defendants. The issue is whether, on more careful analysis, it is only this mere association that can properly be inferred. *See, e.g., United States v. Austin*, 786 F.2d 986, 988 (10th Cir. 1986) ("A defendant's mere association with conspirators is not enough to support a conspiracy conviction."). In evaluating the motion, the court is ever mindful that it would be entirely improper for it to substitute its judgment for that of the jury. *See United States v. Copus*, 110 F.3d 1529, 1534 (10th Cir. 1997). After thoroughly reviewing the trial record, the court concludes that, even viewing the evidence in the light most favorable to the government and drawing every permissible inference in the government's favor, the evidence was insufficient as a matter of law to support a jury finding beyond a reasonable doubt on the element of intent. Accordingly, the court grants Mr. McClatchey's motion for acquittal.

Mr. McClatchey's position is fundamentally different from the positions of Mr. Anderson and the Drs. LaHue. What is illegal under the Anti-Kickback Act is to offer or pay remuneration to induce referrals, or to solicit or receive remuneration in return for referrals. 42 U.S.C.

§ 1320a-7b(b). The evidence at trial was overwhelming that it was Mr. Anderson, not Mr. McClatchey, who offered and paid remuneration to the LaHues. Specifically, Mr. Anderson directed the $150,000 annual payments to the LaHues and Mr. Anderson assigned Mr. Eckard to assist BVMG. Mr. McClatchey played only a peripheral role in the alleged offer and payment scheme because there is simply no evidence that he personally offered or paid or directed any remuneration to induce referrals. As such, the government can obtain a conviction only on a coconspirator liability theory. *See Self*, 2 F.3d at 1085, 1089; *Pinkerton*, 328 U.S. at 640.[11] The evidence was that Mr. McClatchey was in many ways caught in the middle between Mr. Anderson, who (the jury was entitled to find) insisted that the LaHues be paid $150,000 per year and that Mr. Eckard continue to work for BVMG, and Mr. Keel, Mr. McGrath, and Mr. Eckard, who had the day-to-day responsibility for monitoring contract performance.

The government's principal contention at trial was that Mr. McClatchey made the illegal kickback scheme possible by preparing the hospital for the influx of

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[11] That is, Mr. McClatchey's conviction on count three, the substantive count, cannot stand unless he is also guilty of the count one conspiracy. The government cannot support Mr. McClatchey's count three conviction on an aiding and abetting theory because there is no evidence from which a reasonable jury could conclude he did anything material to the Baptist/BVMG relationship after the statute of limitations critical date in July 1993. *See* 18 U.S.C. § 3282 (5 year statute of limitations); *United States v. Jaynes*, 75 F.3d 1493, 1506 (10th Cir. 1996); 18 U.S.C. § 2 (aiding and abetting statute).

patients and facilitating the hospital's overall relationship with BVMG. He surely did so, as he openly admitted when he took the witness stand at trial. The government may not, however, obtain a conviction merely by relying on actions Mr. McClatchey legitimately took as Chief Operating Officer of Baptist Medical Center. There is nothing illegal or susceptible to an inference of criminal intent, for example, for the Chief Operating Officer of a hospital merely to prepare for an expected influx of patients and facilitate a potentially bona fide relationship with a group of doctors from whom patient referrals are expected as a by-product.

The court has reviewed every shred of evidence the government has marshaled against Mr. McClatchey and conducted its own extremely thorough independent review of the record. Even granting the government all the inferences to which it is entitled, the court's efforts have led it to the unmistakable conclusion that the evidence was insufficient to support his conviction. Every time Mr. McClatchey appears in the chronology of events in this case, he is either merely a silent document recipient, acting to bring the BVMG/Baptist relationship into compliance with what the lawyers told him was required, or acting in the normal course of his employment as Chief Operating Officer. To be sure, Mr. McClatchey knew there were grave risks attendant to Baptist's relationship with BVMG. But he also knew that the lawyers had given the basic structure their blessing. Every time there is evidence that Mr. McClatchey learned the relationship drifted too far afield from the lawyers' directions, he took serious and decisive efforts to bring the hospital into compliance.

When the BVMG/Baptist relationship was in its infancy, Mr. McClatchey had very little to do with the day to day arrangements. Mr. Anderson directed that the remuneration be paid, and Mr. Keel and Mr. Eckard had responsibility to foster and monitor the relationship. Mr. McClatchey was kept up to date with written correspondence, but took almost no direct action. He knew, for example, that Mr. Keel recommended modifying the relationship in early 1986 to reduce the fees and shore up the terms of the contract, but he had little or no substantive involvement in these activities. Mr. Keel, Mr. Eckard, and Ms. Lehr took on those duties. There is no evidence that any involvement Mr. McClatchey did have in connection with shoring up the contract was anything other than legitimate.

As the relationship progressed, Mr. McClatchey acted only in conformance with his understanding of the law. In 1987, Mr. McClatchey received the memo from Deb Grimes informing him that the LaHues were not sufficiently performing services under the contract. Mr. McClatchey said he would "take care of it." He ruffled feathers and hospital front line staff began using the LaHues' services.[12] His actions were entirely consistent with his understanding that the LaHues needed to be performing valid services for the relationship to be legal, and he had every right to rely on the earlier efforts of Mr.

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[12] Although Mr. Eckard testified that the pressure to comply with the contract was eventually taken off the hospital front line staff, *see* Tr. at 5570, his testimony is unclear about who took the pressure off and about whether pressure was taken off completely or only in limited areas. It permits no inculpatory inference as to Mr. McClatchey.

Keel, Mr. Eckard, and Ms. Lehr to draft a contract that was legal. Mr. McClatchey also recommended against increasing the fees to the LaHues in this time period. Moreover, when it later became clear that the Eckard arrangement had tax and other negative implications for the hospital,[13] Mr. McClatchey willingly joined with Mr. Probst to recommend Mr. Eckard's termination.

After the Health Midwest merger, Mr. McClatchey took on a greater role with respect to the Baptist/BVMG relationship, and continued his work to keep it on course. In the summer of 1991, when Mr. Keel made some rather inappropriate suggestions for contract modifications, Mr. McClatchey did not adopt the recommendations but forwarded the ideas to the hospital's lawyers. Later in 1991, when Mr. McGrath told him there were problems with the delivery of services, Mr. McClatchey was surprised and directed Mr. McGrath to check out the problem and report back. In connection with the contract changes Mr. Thompson had recommended, Mr. McClatchey highlighted an area he believed ought not to be part of the contract because he was concerned the activities would not occur. After learning that the Eckard arrangement was a problem, he took decisive action to bring Mr. Eckard back to the hospital.[14]

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[13] No one had identified the Eckard arrangement as a potential Medicare fraud problem in this time period.

[14] Mr. McClatchey's initial inquiries about how to fix the Eckard arrangement without destroying the hospital's relationship with BVMG do not allow for an inference of criminal intent because the evidence is uncontroverted that Mr. McClatchey was trying to make the relationship legal and relied on Mr. Thompson in dealing with Robert LaHue. He suggested

Mr. McClatchey's motion for acquittal is granted because the evidence was insufficient to support the jury's verdict. When Mr. McClatchey's involvement in the BVMG/Baptist relationship is viewed as a whole with all the evidence in the case, his activities allow at most a suspicion of guilt. *See United States v. Valadez-Gallegos*, 162 F.3d 1256, 1262 (10th Cir. 1998) ("The evidence supporting the conviction must be substantial and do more than raise a suspicion of guilt."). The evidence was simply insufficient for a reasonable jury to find Mr. McClatchey specifically intended to join a conspiracy specifically intending to do something the law forbids. The fact of the matter is that the evidence points to only one conclusion: Mr. McClatchey, like Ms. Lehr and Mr. Thompson, believed the relationship between Baptist and BVMG could be a legal one and acted at all times to keep it on the proper side of the law. He is entitled to judgment of acquittal.

E. Unlawful Inducement

Each defendant also claims that the government's proof is insufficient because there was no evidence that the remuneration offered, paid, solicited, and received was "to induce" or "in return for" patient referrals. Each

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that BVMG should pay the hospital for Mr. Eckard's services, and (with Mr. Thompson) made it clear in no uncertain terms that Mr. Eckard was no longer BVMG's free employee. Mr. Eckard, of course, continued to facilitate doctor/hospital relationships, but that was to be expected from a hospital marketing specialist. The evidence is uncontroverted that Mr. Eckard's continuing to perform services specific to BVMG upon his return to Baptist was entirely his own doing.

defendant has a slightly different approach to this argument, but the defendants essentially claim that the government's tactic of showing remuneration paid and patients referred is insufficient unless the government proves beyond a reasonable doubt that the remuneration and patients are somehow linked. The court agrees with the defendants' legal proposition, but concludes that the government's proof was sufficient to provide the necessary link. Accordingly, the motions to acquit on this basis are denied.

The jury instructions on the element of inducement were explicit:

> In order to sustain its burden of proof against the hospital executives for the crime of violating the Anti-Kickback statute, the government must prove beyond a reasonable doubt that the defendant under consideration offered or paid remuneration with the specific criminal intent "to induce" referrals. To offer or pay remuneration to induce referrals means to offer or pay remuneration with intent to gain influence over the reason or judgment of a person making referral decisions. The intent to gain such influence must, at least in part, have been the reason the remuneration was offered or paid.
>
> On the other hand, [the hospital executive defendants] cannot be convicted merely because they hoped or expected or believed that referrals may ensue from remuneration that was designed wholly for other purposes. Likewise, mere oral encouragement to refer patients or the mere creation of an attractive place to which patients can be referred does not violate the law.

> There must be an offer or payment of remuneration to induce, as I have just defined it.

Jury Instruction No. 32; *see also* Jury Instruction No. 33 (as to doctors, statute requires government to prove remuneration "in return for" patient referrals).

The court believes the evidence was easily sufficient for a jury to infer that remuneration was offered, paid, solicited, or received to induce and in return for patient referrals, as those terms are defined in the court's instructions. The LaHues all but explicitly told University Hospital that higher payment offers at Baptist would cause them to move their patients. Mr. Anderson began directing $75,000 per year to the LaHues before the parties had ever established what the LaHues would do for that money. Mr. Eckard described the consulting services the LaHues provided at Baptist and other hospitals as "minimal to none." For Mr. Anderson, the $75,000 payments and Mr. Eckard's services were the starting point. The varying justifications were developed only later.

The defendants argue they are entitled to acquittals because the government provided no evidence that the value of the LaHues' services was less than the amount the hospitals paid. The defendants relied on testimony from medical experts like Dr. Nevada Lee who explained that the services Baptist was paying the LaHues for had real value. The government, in contrast, had no single valuation witness who testified that the hospital paid more than fair market value for the consulting services. In fact, the evidence was overwhelming that the services specified in the consulting contracts, on their face, were not grossly disproportionate with the fees paid. The

defendants assert that one of the government's trial themes, a "search for value," impermissibly saddled them in the jury's eyes with an evidentiary burden that should have been placed on the government.

This argument has no merit. Were the government's case based solely on a disparity of value between remuneration paid and services rendered, the defendants' argument might be more persuasive.[15] The government was not, however, required to prove anything about value. The government was required to prove that remuneration was offered, paid, solicited, or received to induce or in return for patient referrals. *See* 42 U.S.C. § 1320a-7b(b); Jury Instruction Nos. 32, 33. The government's evidence, as outlined above, is sufficient to allow a reasonable jury to make the necessary inference. The defendants' proof that the consulting services had value was merely evidence the jury was entitled to weigh in considering whether to credit the government's evidence. The jury apparently gave the defendant's proffered "fair market value" justification little weight, as it was perfectly entitled to do.

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[15] The matter would still be of some debate, however. For example, it would have been permissible for the jury to infer lack of fair market value from the retrospective process of setting fees first and specifying services later, and from the evidence that the front line people at the hospital who were supposed to benefit from the LaHues' services had little interest in actually receiving them. The jury certainly could have considered the testimony given at trial about reasonable value for physician services and the amount of time the government's evidence showed that the LaHues devoted to carrying out their duties under the consulting contracts.

III. Motions for New Trial

The defendants assert a number of errors which they believe entitle them to a new trial. Specifically, they contend that (1) there was a prejudicial variance from the indictment, (2) they are entitled to relief from misjoinder and prejudicial joinder, (3) various instructional errors prejudiced them, (4) the court erred in admitting the government's proffered Fed. R. Evid. 801(d)(2)(E) evidence under a joint venture conspiracy theory rather than a criminal purpose conspiracy theory, and (5) various forms of alleged prosecutorial misconduct prejudiced them. The court denies these motions except as to Mr. McClatchey, to whom, in the alternative to its acquittal of him, *see* Fed. R. Crim. P. 29(d), the court grants a new trial on the variance issue.

A. Standard

Fed. R. Crim. P. 33 provides that the court may grant a new trial to a defendant if required in the interest of justice. Any error which would require reversal on appeal is a sufficient basis for granting a new trial. *United States v. Stiner*, 765 F. Supp. 663, 664 (D. Kan. 1991), *aff'd*, 952 F.2d 1401 (10th Cir. 1992). A motion for a new trial is not viewed with favor, however, and should be granted with great caution. *United States v. Chatman*, 994 F.2d 1510, 1518 (10th Cir. 1993). The decision to grant a motion for a new trial lies within the trial court's discretion. *United States v. Custodio*, 141 F.3d 965, 966 (10th Cir.), *cert. denied*, 119 S.Ct. 243 (1998).

B. Variance

The defendants claim that they are entitled to a new trial because of a prejudicial variance between the indictment and the government's proof. Specifically, Mr. Anderson and Mr. McClatchey claim that they were prejudiced by spillover from what they view as the "other hospitals" conspiracies originally charged against them as part of the broad count one conspiracy but later cut out of count one when the court, at the defendants' request, found at trial that no reasonable jury could find that Mr. Anderson and Mr. McClatchey were part of the broad conspiracy charged.[16] They also claim prejudicial variance from the government's indicting the attorneys yet failing to prove the attorneys criminally culpable. Finally, they claim that the court should have given a multiple conspiracy instruction. After careful review, the court does not believe Mr. Anderson suffered prejudice from the variance and accordingly denies his motion for a new trial. The court reaches the opposite conclusion as to Mr. McClatchey, and therefore grants Mr. McClatchey's motion for a new trial as an alternative to his acquittal.

The Fifth Amendment grand jury guarantee is not violated if a defendant is convicted upon evidence tending to show a more narrow scheme than that contained in the indictment, provided that the narrower scheme is fully included within the indictment. *See United States v. Wright*, 932 F.2d 868, 874 (10th Cir. 1991) (citations and

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[16] Although the Drs. LaHue join in Mr. Anderson's and Mr. McClatchey's motions by reference, these issues do not affect them because they do not claim to have suffered, nor did they suffer, any prejudice from the variance.

internal quotation marks omitted) (holding that trial court's approach of presenting conspiracy charge to jury on only the limited conspiracy supported by the evidence rather than the broad conspiracy alleged in the indictment was proper); *see also United States v. Hornung*, 848 F.2d 1040 (10th Cir. 1988) (appropriate to submit narrowed conspiracy charge to jury where evidence does not support broad conspiracy alleged). On the other hand, a variance occurs

> when the evidence adduced at trial establishes facts different from those alleged in the indictment. . . . However, a variance is not fatal to the government's case unless the variance affects the substantial rights of the accused. . . . Accordingly, where a single conspiracy is charged in the indictment, and the government proves only multiple conspiracies, a defendant who suffers substantial prejudice must have his conviction reversed.
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> A defendant's substantial rights are affected in the context of a variance when the jury determines a defendant's guilt by relying on evidence adduced against coconspirators who were involved in separate conspiracies. . . . In evaluating whether a potential prejudicial spillover impermissibly affected the fairness of a trial in which a variance occurred, we have considered the following factors: (1) whether the proliferation of separate conspiracies in the case affected the jury's ability to segregate each defendant's individual actions and participation, (2) whether the variance caused confusion among the jurors as to the limited use of certain evidence, and (3) the strength of the evidence underlying the conviction.

United States v. Edwards, 69 F.3d 419, 432-33 (10th Cir. 1995). (citations and internal quotation marks omitted); *see also Wright*, 932 F.2d at 874 ("[A] variance is not harmless if the evidence adduced against co-defendants involved in separate conspiracies was more likely than not imputed to the defendant by the jury."). Jury instructions may safeguard a defendant from any impermissible prejudice. *Id.*

The court agrees with the defendants that there were two variances in this case. The first was the variance the court recognized at trial when it narrowed the count one conspiracy. The second was the variance with respect to the government's failure of proof as to the lawyer defendants. In a typical case, the mere fact that the government fails to convict one or more alleged coconspirators does not create a variance. *See United States v. Diana*, 605 F.2d 1307, 1310 (4th Cir. 1979) (jury acquittal of codefendant did not create variance because "there was evidence to show a single four-link conspiracy even though the jury did not convict the members of the fourth link in the chain."). In this case, however, the government failed even to submit enough proof to create a jury issue. The government obtained indictment on the theory that the lawyer defendants were active participants in a conspiracy to create sham contracts to paper over a kickback scheme. The evidence at trial fell far short of proving any impropriety on the part of the lawyers.[17] Accordingly, the

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[17] Despite the court's acquittal of the lawyer defendants at the close of the government's evidence, the government stubbornly maintained in its closing argument and continues to maintain in its post trial briefing that the lawyer defendants

court believes a variance occurred. *See Edwards*, 69 F.3d at 432 ("A variance arises when the evidence adduced at trial establishes facts different from those alleged in an indictment.").

The court does not believe the variance with respect to the other hospitals affected Mr. Anderson's substantial rights sufficient to warrant a new trial. As the court explained in denying the defendants' motion for dismissal for variance at the close of the government's case,

> The Court believes . . . that the dismissal issue is not even close. The evidence adduced at trial simply tends to show a narrower scheme than the one alleged in the indictment. The Court believes there will be minimal prejudice in going forward without dismissal because there are not a proliferation of separate conspiracies in the case; there are at most two types of conspiracy. There was evidence of one conspiracy at Baptist allegedly involving all the Defendants

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were criminally involved in the alleged scheme. *See* Tr. at 9762 ("The evidence in this case has been that the attorneys were well aware that the – that this was a paying for patients deal and worked to develop agreements that covered up that fact."); *see also* Govt. Response Brief (Doc. 443), at 169 (arguing, despite court's ruling that inference of criminal intent on the part of the lawyer defendants was unreasonable as a matter of law, that prosecutor's closing argument was proper because "[p]rosecutors . . . may argue reasonable inferences from the evidence that the jury has seen and heard."). In the court's thorough review of the evidence at the close of the government's case and in the court's even more exhaustive review of the evidence in connection with the pending motions, it found not one shred of evidence that even comes close to indicating that the lawyer defendants acted with specific intent to violate the law.

> and there was evidence of separate conspiracies at the non-Baptist hospitals, involving at most the LaHues and one or more unindicted coconspirators. Moreover, the government has presented evidence in a cogent, easily separable fashion, and there is little risk of jury confusion between the two types of conspiracies. In addition, the Court has given limiting instructions at the request of the Defendants as to each of the witnesses and with regard to each of the items of evidence presented as to those counts that involve the non-Baptist hospitals.

Tr. at 7350-51. The evidence against Mr. Anderson, if not overwhelming, was substantial and the court does not believe the case was so close that Mr. Anderson suffered prejudicial spillover from the variance. *See also United States v. Austin*, 774 F.2d 99, 101 (5th Cir. 1985) ("The present case differs from *Kotteakos* [*v. United States*, 328 U.S. 750, 772 (1946) (proliferation of separate conspiracies and defendants required reversal)] . . . in one significant respect. In *Kotteakos* . . . , the trial judge did not narrow the general conspiracy charge to conform to the proof at trial. The jury was allowed to consider the broad conspiracy even though there was no evidence to show that the defendant had participated in it. The danger of transference of guilt from one defendant to another unrelated defendant was very real. In the present case, however, the trial judge limited the conspiracy charge. . . . The judge instructed the jury not to consider any other agreement . . . or the alleged participation of [alleged coconspirator] Fontenot. These instructions and the careful delimitation

of the conspiracy charge submitted to the jury removed any danger of transference of guilt.").[18]

The variance with respect to the lawyer defendants does not entitle Mr. Anderson to a new trial, either. There was sufficient evidence to convict him independent of the sham contract theory. *See supra*, part II.C. The evidence was sufficient for a jury to find that, despite the attempts of Ms. Lehr and Mr. Thompson to keep the relationship on the right side of the line, Mr. Anderson willfully paid remuneration to induce the LaHues to refer Medicare patients to Baptist. Accordingly, the court denies Mr. Anderson's motion for a new trial on variance grounds.

The court reaches a different conclusion as to Mr. McClatchey because, as the court explained *supra* at part II.D, Mr. McClatchey's involvement in the alleged scheme was heavily dependent on the scope of the lawyer defendants' involvement. Every time Mr. McClatchey appears in the chronology of events, he is either a silent document recipient, acting to bring the BVMG/Baptist relationship into compliance with what the lawyers told him was

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[18] The court recognizes, however, that Mr. Anderson suffered some greater prejudice than he would have suffered if count one of the indictment had made no reference to the other hospitals at all. As charged, count one and the government's opening statement improperly linked him with the LaHues as to the other hospitals. Nevertheless, in a joint trial involving Mr. Anderson and the LaHues that did not involve conspiracy or other charges at the other hospitals, the court likely would have admitted evidence related to the other hospitals on the limited issue of the LaHues' intent at Baptist. *See infra* Part III.C.; Fed. R. Evid. 404(b). Because the evidence was not close as to Mr. Anderson, however, the court does not find that this slight prejudice affected Mr. Anderson's substantial rights.

required, or acting in the normal course of his employment as Chief Operating Officer. In light of the government's stubborn closing argument to the effect that the lawyers were guilty, the court believes the variance affected Mr. McClatchey's substantial rights.

Also a factor in the court's decision to grant Mr. McClatchey a new trial, albeit a very minor one, is the danger for spillover from the other hospitals evidence. Were this factor standing alone, the court would not grant Mr. McClatchey a new trial. However, one of the circumstances to evaluate in determining whether a defendant's substantial rights are affected by spillover in a variance context is "the strength or weakness of the evidence underlying the jury's conviction." *Wright*, 932 F.2d at 876. This circumstance weighs heavily in Mr. McClatchey's favor because the evidence against him was weak.[19] On the other hand, and as the court explained above in connection with Mr. Anderson, the other two circumstances to evaluate, whether there were a proliferation of separate conspiracies and whether there was a risk of jury confusion, *see id.*, weigh against a new trial based on spillover. In any event, the court grants Mr. McClatchey's

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[19] Although evidence concerning the LaHues' solicitations at the other hospitals causes no severance concerns because it would likely have been admitted against them in a joint trial with Mr. McClatchey subject to a limiting instruction prohibiting consideration against Mr. McClatchey, *see infra* part III.C, the count one allegations and the government's opening statement actually linking Mr. McClatchey to the other hospitals make it more likely the jury was led astray by spillover in the variance context in light of the lack of evidence of his criminal intent.

motion for a new trial in the alternative to its judgment of acquittal.

The defendants also claim prejudice from the court's refusal to give a multiple conspiracy instruction. *See Edwards*, 69 F.3d at 433 ("A multiple conspiracy charge instructs the jury to acquit if it finds that the defendant was not a member of the indicted conspiracy but rather was involved in another conspiracy.") (citation omitted). This argument is without merit because the Tenth Circuit does not require such an instruction "as long as the instructions informed the jury that 'the government had the burden of proving beyond a reasonable doubt the [single] conspiracy as alleged, and that the evidence should be considered separately as to each defendant.' " *Id.* (citations omitted). The court's instructions clearly comply with Tenth Circuit law. *See* Instruction Nos. 3 and 21. Moreover, to the extent the defendants argue that the jury should have been instructed to acquit if it failed to find the broad conspiracy originally alleged in count one, their argument is without merit because the court found dismissal of the case for the count one "other hospitals" variance to be inappropriate as a matter of law. *See* Tr. at 7350-51.

C. Severance

The defendants, in particular Mr. Anderson,[20] claim that the court erred in denying their motion for severance based on misjoinder, *see* Fed. R. Crim. P. 8(b), and prejudicial joinder. *See* Fed. R. Crim. P. 14. These arguments are without merit.

Joinder under Rule 8(b) is proper where defendants "are alleged to have participated in the same act or transaction or the same series of acts or transactions." The test for proper joinder, according to the Tenth Circuit, is whether there is "a common thread to each of the defendants." *United States v. Rogers*, 921 F.2d 975, 984 (10th Cir. 1990) (citation omitted). The link "may be established by common evidence as to various counts." *Id.* (citations omitted). "In conspiracy cases, the general rule is that persons indicted together should be tried together." *Id.* (citation omitted). The Tenth Circuit endeavors to "strike a balance in favor of joint trials." *Id.* (citation omitted).

The court denies the defendants' motion for severance on misjoinder grounds because it believes counts five through nine were properly joined with counts one through three. Even though the court ruled that no reasonable jury could conclude the hospital executive defendants were guilty of conspiring to violate the Anti-Kickback Act at the other hospitals, the evidence is

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[20] Mr. Anderson specifically moves for a new trial on the issue of prejudicial joinder. The other defendants incorporate his arguments by reference. The court does not consider the motion as to the Drs. LaHue, however, because they do not claim to have suffered prejudice from being joined with one another or with the hospital executive defendants.

uncontroverted that they knew the LaHues were approaching those other hospitals. *See United States v. Anderson*, No. 98-20030/01/-07-JWL, 1999 WL 79652, at *2 (D. Kan. Jan. 12, 1999) ("The defendants concede that knowledge is a key element in discerning the propriety of 8(b) joinder."). Moreover, counts one through nine were all highly dependent on the common testimony of one witness – Tom Eckard. The court believes joinder under Rule 8(b) was proper.

Rule 14 provides relief from prejudicial joinder. Severance under Rule 14 is committed to the sound discretion of the trial judge. *United States v. Johnson*, 130 F.3d 1420, 1427 (10th Cir. 1997). Severance is appropriate only where a defendant can make a "strong showing of prejudice" from being tried together with his or her codefendants. *United States v. Edwards*, 69 F.3d 419, 434 (10th Cir. 1995).

> Prejudice occurs when there is a serious risk that a joint trial [will] compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence. . . . Neither a mere allegation that defendant would have a better chance of acquittal in a separate trial, nor a complaint of the "spillover effect" of damaging evidence is sufficient to warrant severance.

Id. (citations and internal quotation marks omitted).

The court denies the motion for severance on prejudicial joinder grounds because it does not believe Mr. Anderson or Mr. McClatchey suffered the high level of prejudice the law requires. Mr. Anderson's arguments are essentially a rehash of his pretrial arguments claiming

unfairness in being tried with the LaHues and the lawyers. The court denied Mr. Anderson's motion then, and it denies it again now. The facts of this case, while complicated and voluminous, were presented in an easily separable form.[21] Moreover, the court's instructions to the jury, requiring separate consideration of the evidence as to each defendant, minimized any possible prejudice.[22]

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[21] The court does not believe the defendants suffered any unfair prejudice in the severance context in the government's closing argument references to the other hospital evidence as evidence sufficient to infer the criminal intent of the LaHues at Baptist. Having carefully reviewed the objected to rhetoric, the court concludes that it properly focused the attention of the jury on the mindset of the doctor defendants and did not improperly implicate the hospital executive defendants. *See United States v. Brewer,* 630 F.2d 795, 803 (10th Cir. 1980) ("Where a case is 'vigorously argued by both sides . . . , [t]he closing argument of a prosecutor need not be confined to such detached exposition as would be appropriate in a lecture.' ") (citations omitted). Moreover, the defendants did not object to the references contemporaneously; the plain error rule applies and the court finds no plain error. *See United States v. Olano,* 113 S.Ct. 1770 (1993); Fed. R. Crim. P. 52(b) (plain error rule).

[22] The court notes that the evidence of other hospital solicitations by the LaHues would likely have been admissible against the LaHues (with proper limiting instructions) in a trial of the collective defendants only on the Baptist-related counts. *See* Fed R. Evid. 404(b); 403. The probative value as to their intent, a crucial issue, was very high and the unfair prejudicial effect on them would have been very low. Of course, just as occurred here, that evidence would not have been admitted against the hospital executive defendants. Thus, even if the non-Baptist counts had been severed, Mr. Anderson and Mr. McClatchey would have had to contend with the same minimal spillover for which they now seek a new trial.

D. Jury Instructions

The defendants claim error in a number of different jury instructions. The court finds these arguments to be without merit. When determining the adequacy of jury instructions, the court must consider the instructions as a whole to determine whether they adequately state the law and provide the jury with ample understanding of the issues and controlling principles of law. *United States v. Edwards*, 69 F.3d 419, 433 (10th Cir. 1995).

1. Instruction Nos. 32 and 33[23]

The defendants claim that Jury Instruction Nos. 32 and 33 were erroneous because they allowed the jury to convict if only "one purpose" of the remuneration offered, paid, solicited, or received was to induce or in return for Medicare patient referrals.[24] *See United States v.*

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[23] Instruction Nos. 32 and 33 were parallel instructions, with Instruction No. 32 applicable to the hospital executive defendants under the "offer or pay" prong of the statute, *see* 42 U.S.C. § 1320a-7b(b)(2), and Instruction No. 33 applicable to the doctor defendants under the "solicit or receive" prong of the statute. *See* 42 U.S.C. § 1320a-7b(b)(1).

[24] Instruction No. 32 is reprinted verbatim *supra* at section II.E. Instruction No. 33 reads as follows:

> [I]n order to sustain its burden of proof against the doctor defendants for violating the Anti-Kickback statute, the government must prove beyond a reasonable doubt that the defendant under consideration solicited or received remuneration with specific criminal intent that the remuneration be "in return for" referrals. To solicit or receive

Greber, 760 F.2d 68, 71 (3d Cir. 1985); *United States v. Kats*, 871 F.2d 105, 108 (9th Cir. 1989). According to the defendants, the law allows conviction only if the "primary purpose" of the remuneration was to induce or in return for Medicare patient referrals. *See United States v. Bay State Ambulance & Hosp. Rental Serv.*, 874 F.2d 20, 30 (1st Cir. 1989); *United States v. Jain*, Nos. 94-00087-01, 94-00087-02-CR-W-6 (W. D. Mo. 1995), *conviction aff'd. in part and rev'd in part on other grounds*, 93 F.3d 436 (8th Cir. 1996).

The court thoroughly considered its ruling on this issue at trial and is persuaded that the instructions given were proper. This case was a case of first impression in the Tenth Circuit. Accordingly, the court drafted Instruction Nos. 32 and 33 after extensive pretrial and trial briefing and full oral argument by the parties. It carefully considered Congress' intent in drafting the statute, the

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remuneration in return for referrals means to solicit or receive remuneration with intent to allow the remuneration to influence the reason and judgment behind one's patient referral decisions. The intent to be influenced must, at least in part, have been the reason the remuneration was solicited or received.

On the other hand, defendants Robert LaHue and Ronald LaHue cannot be convicted merely because they received remuneration wholly in return for services and also decided to refer patients to the hospital. Likewise, mere referral of patients because of oral encouragement or because of a belief that the place to which the patients are to be referred is attractive does not violate the law. There must be a solicitation or receipt of remuneration in return for referrals, as I have just defined it.

views expressed in relevant legal commentary, and the insights to be drawn from the case law on the subject. *See, e.g., United States v. Starks*, 157 F.3d 833 (11th Cir. 1998); *United States v. Jain*, 93 F.3d 436 (8th Cir. 1996); *Hanlester Network v. Shalala*, 51 F.3d 1390 (9th Cir. 1995); *United States v. Bay State Ambulance & Hosp. Rental Serv.*, 874 F.2d 20 (1st Cir. 1989); *United States v. Kats*, 871 F.2d 105 (9th Cir. 1989); *United States v. Greber*, 760 F.2d 68 (3d Cir. 1985). In the end, the court wrote instructions that it believes accurately capture the essence of what Congress prohibited when it enacted the Anti-Kickback Act. Namely, the instructions make clear that what is prohibited is the offering, payment, solicitation, or receipt of remuneration when the remuneration is intended to influence patient referral decisions. *See Greber* 760 F.2d at 71 ("Even if the physician performs some service for the money received, the potential for unnecessary drain on the Medicare system remains. The statute is aimed at the inducement factor."), *quoted in Bay State Ambulance & Hosp. Rental Serv.*, 874 F.2d at 30. The instructions also make clear that the statute does not prohibit financial relationships where the remuneration is intended wholly for other purposes but patient referrals are nonetheless otherwise encouraged, hoped for, or made. *See Hanlester Network*, 51 F.3d at 1397 ("mere encouragement would not violate the statute."). The instructions incorporate the apparent Congressional mandate that any remuneration offered, paid, solicited, or received for an improper purpose is illegal, yet the instructions also protect healthcare professionals from being convicted merely because they are astute businesspeople. Despite the defendants' observations and arguments that the court's interpretation of

the statute may prohibit many beneficial relationships in addition to those that threaten the integrity of Medicare, the court believes that the extremely broad language of the statute simply does not allow for judicial narrowing. *See* 42 U.S.C. § 1320a-7b(b) ("Whoever knowingly and willfully solicits or receives any remuneration . . . in return for [Medicare patient referrals] [and][w]hoever knowingly and willfully offers or pays any remuneration . . . to induce [Medicare patient referrals]."). [25] The defendants will need to make their arguments in another forum.

2. Instruction No. 30

The defendants claim error in the court's instruction that the hospital defendants could be convicted if they offered or paid remuneration "to induce" patient referrals

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[25] The court believes the Anti-Kickback Act is not a statute like the one in *United States v. Sun-Diamond Growers*, 119 S. Ct. 1402, 1410 (1999), that can "linguistically be interpreted to be either a meat axe or a scalpel." The statute is simply a meat axe. Nor is the Anti-Kickback Act a statute like the mail and wire fraud statutes where the court must go beyond the language of the statute to infer that Congress intended to incorporate the established meaning of a common law term of art. *Neder v. United States*, 119 S.Ct. 1827, 1840 (1999) (mail and wire fraud statutes require government to show materiality despite absence of the term in statutory language because common law fraud required materiality). Relative to the centuries of baggage accompanying the word "defraud," the words "to induce" and "in return for" are newcomers as legal terms of art. The court will not engraft a materiality requirement on the Anti-Kickback Act when there is no indication that Congress intended these words to incorporate such a requirement.

despite the indictment's failure to recite the statutory magic words. The defendants point out that the narrative portion of the indictment explicitly references only a scheme to offer, pay, solicit, or receive remuneration "in return for" patient referrals. By charging the jury with language not explicitly included in the indictment, the defendants claim, the court constructively amended the indictment and violated their Fifth Amendment rights.

This argument has no merit because, despite the narrative language in the indictment, the indictment specifically cited § 1320a-7b(b)(2), the offer or payment to induce prong of the statute. Moreover, the indictment read as a whole fairly apprizes the defendants that the hospital executive defendants were charged with offering or paying remuneration to induce. *See United States v. Mobile Materials, Inc.*, 871 F.2d 902, 906-07 (10th Cir.) (court must view indictment as a whole, with an emphasis on common sense rather than technicalities), *modified on other grounds*, 881 F.2d 866 (10th Cir. 1989) (en banc). Accordingly, the defendants are not entitled to a new trial on this basis.

3. Instruction Nos. 36 and 37

The defendants renew their contention that Instruction Nos. 36 and 37, the instructions defining the "willfulness" element of the Anti-Kickback Act and the proper means by which the jury could infer willfulness, were improper because the court failed to instruct pursuant to *Cheek v. United States*, 498 U.S. 192 (1991) and *Ratzlaf v. United States*, 510 U.S. 135 (1994). Under the willfulness element of the statute at issue in *Cheek*, a defendant

cannot be convicted of willful violation of the tax laws unless he or she is aware of the specific provision of the tax code that he or she was charged with violating. *Cheek*, 498 U.S. at 201. Similarly, under the willfulness element of the statute at issue in *Ratzlaf*, a defendant cannot be convicted of willful violation of currency structuring laws unless the defendant knows that the structuring of cash transactions to avoid statutory reporting requirements is unlawful. *Ratzlaf*, 510 U.S. at 138. The defendants contend that the Anti-Kickback Act requires the government to make an equivalent showing of intent.

The court has previously rejected the defendants' arguments on this point and now denies the defendants' motions because they argue for a result that the Supreme Court squarely rejected in a recent decision. In *United States v. Bryan*, 118 S. Ct. 1939, 1945-47 (1998), the Supreme Court considered the appropriate definition of the term "willfully" in connection with 18 U.S.C. § 924(a)(1)(D), a statute making anyone who willfully violates, inter alia, 18 U.S.C. § 922(a)(1)(A), which forbids dealing in firearms without a federal license, subject to felony charges. *Bryan* distinguished *Cheek* and *Ratzlaf* by noting:

> Both . . . cases . . . involved highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct. As a result, we held that [the statutes at issue in *Cheek* and *Ratzlaf*] "carv[e] out an exception to the traditional rule" that ignorance of the law is no excuse and require that the defendant have knowledge of the law. *The danger of convicting individuals engaged in apparently innocent activity that motivated our decisions in* [*Cheek*] *and*

> Ratzlaf *is not present here because the jury found that this petitioner knew that his conduct was unlawful.*

Bryan, 118 S. Ct. at 1947 (emphasis added). The situation is the same here. In order to convict any defendant of the crimes charged, the jury was required to find that that defendant "specifically intend[ed] to do something the law forbids, purposely intending to violate the law." Instruction No. 36; *see also United States v. Starks*, 157 F.3d 833 (11th Cir. 1998) (applying *Bryan* in Anti-Kickback context and concluding that statute did not require proof that defendant acted with knowledge of the Anti-Kickback Act); *see also United States v. Jain*, 93 F.3d 436, 440-41 (8th Cir. 1996) (pre-*Bryan* case approving instruction substantially similar to this court's instruction); *United States v. Dashney*, 117 F.3d 1197, 1201 (10th Cir. 1997). Thus, to convict, the jury was required to find that the defendants knew that their conduct was unlawful. The danger of convicting them based on apparently innocent activity is not present here.

Moreover, even if a *Cheek/Ratzlaf* type instruction were appropriate here, the error was harmless. *See Neder v. United States*, 119 S.Ct. 1827, 1836-37 (1999). The issues in this case had nothing to do with whether the defendants were aware of the Anti-Kickback Act. The defendants at trial readily admitted they knew about the Anti-Kickback Act. They made no claim then and they make no claim now that they were blind-sided by the Act's existence. The essence of the defendants' case was that they were doing everything they could to comply with the dictates of a law they knew about but had difficulty understanding and applying. The issue was whether they

knew their conduct violated a law the evidence overwhelmingly indicated they knew about. Accordingly, the defendants' motion for a new trial on these grounds is denied.

4. Instruction Nos. 7 and 21

Mr. Anderson claims that Jury Instruction No. 7, Jury Instruction No. 21, and the instruction given at the close of the government's case might have allowed jury confusion as to the scope of the count one conspiracy. In Instruction No. 7, the court charged the jury that the non-Baptist evidence could be considered only against the LaHues on the substantive counts for which it was offered, and on count one only as to the intent of the LaHues in connection with their dealings with Baptist. In the instruction at the close of the government's case, the court charged the jury that the non-Baptist evidence could be considered only against the LaHues, without limiting the jury's consideration to the issue of intent. In Instruction No. 21, the court charged the jury that it must acquit on the conspiracy charge unless the government proved the specific conspiracy charged at Baptist.

The court rejects this argument. Indeed, it borders on frivolous. Taken as a whole, the jury instructions clearly explain the scope of the count one conspiracy that remained at the close of the evidence. Moreover, to the extent Mr. Anderson argues that the jury should have been charged that the hospital defendants were entitled to acquittal if the evidence failed to prove the broad, seven hospital conspiracy originally charged in the

indictment, his argument is without merit for the reasons explained *supra*, section III.B.

5. Instruction No. 24

The defendants claim two errors with respect to Instruction No. 24, which instructed the jury on the elements of *Pinkerton* liability.[26] First, they claim that it was error to give the *Pinkerton* instruction because there were no *Pinkerton* allegations in the indictment. Second, they claim that the instruction given was erroneous because it failed to instruct the jury that *Pinkerton* liability was appropriate only if the predicate offense fell within the scope of the unlawful agreement and reasonably could have been foreseen to be a necessary or natural consequence of the agreement.

These arguments do not entitle the defendants to a new trial. The first claim has no merit because the government need not allege *Pinkerton* liability to obtain a *Pinkerton* conviction. *See United States v. Self*, 2 F.3d 1071, 1085, 1089 (10th Cir. 1993) (conspiracy allegations in an indictment allowed court to affirm defendant's conviction for a substantive offense committed by defendant's coconspirator even though the indictment did not specifically allege *Pinkerton* liability as to the substantive count). The second claim has no merit because the court's

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[26] *Pinkerton* liability is a shorthand reference to the concept established in *Pinkerton v. United States*, 328 U.S. 640, 647 (1946), that a conspirator is liable for the reasonably foreseeable acts of his coconspirators committed during the course of and in furtherance of the conspiracy.

instructions, taken as a whole, were correct. *See United States v. Edwards*, 69 F.3d 419, 433 (10th Cir. 1995) (court must consider the instructions as a whole to determine whether they adequately state the law and provide the jury with ample understanding of the issues and controlling principles of law). The court gave the following *Pinkerton* instruction:

> A member of a conspiracy who commits another crime during the existence or life of the conspiracy and who commits this other crime in order to further or somehow advance the goals or objectives of the conspiracy, may be found by you to be acting as the agent of the other members of the conspiracy. The illegal actions of this person in committing this other crime may be attributed to other individuals who are then members of the conspiracy. Under certain conditions, therefore, a defendant may be found guilty of this other crime even though he or she did not participate directly in the acts constituting that offense.
>
> If you find that the government has proven that a particular defendant is guilty of the conspiracy as charged in Count 1 of the indictment, beyond a reasonable doubt, you may also find that defendant guilty of the crimes alleged in Counts 2 and 3 of the indictment in which he or she is charged, provided that you find that the essential elements of that count as defined in these instructions have been established beyond a reasonable doubt and, provided further, that you also find beyond a reasonable doubt, that:
>
> *FIRST:* the substantive offense of violating the Anti-Kickback statute as described in Counts 2

> or 3 of the indictment was committed by a member of the conspiracy;
>
> *SECOND:* the substantive crime was committed during the existence or life of and in furtherance of the goals or objectives of the conspiracy; and
>
> *THIRD:* at the time that this substantive offense was committed, the defendant under consideration was a member of the conspiracy.

Instruction No. 24. This instruction is drawn verbatim in all material respects from the pattern instruction given in Devitt, Blackmar, & O'Malley, *Federal Jury Practice and Instructions, Criminal 4th* § 28.10 (1990). Although the Tenth Circuit has not directly weighed in on the issue, *cf. United States v. Willis*, 102 F.3d 1078, 1083 (10th Cir. 1996) ("the co-conspirator has criminal responsibility unless 'the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.' ") (quoting *Pinkerton*, 328 U.S. at 647-48, 66 S.Ct. at 1184), a number of federal appellate courts have approved instructions identical in all material respects to the court's instruction here. *See United States v. Aramony*, 88 F.3d 1369, 1381 (4th Cir. 1996); *United States v. Vasquez*, 858 F.2d 1387, 1393 (9th Cir. 1988); *United States v. Manzella*, 791 F.2d 1263, 1267 (7th Cir. 1986) (*Pinkerton* instruction nearly identical to this court's instruction "contain[ed] every element of the *Pinkerton* doctrine, arrayed in an order calculated to maximize the likelihood that the jury will grasp this complicated concept."). *But see United*

States v. Turcks, 41 F.3d 893, 897 (3d Cir. 1994) (error not to give foreseeability instruction, but failure did not amount to plain error sufficient to warrant reversal); *United States v. Broadwell*, 870 F.2d 594, 603 (11th Cir. 1989) (error not to give foreseeability instruction, but error was harmless).

In any event, even if the court's instruction was erroneous, the error was harmless because the substantive offenses alleged and proven in counts two and three were also the alleged and proven objects of the conspiracy. *See Willis*, 102 F.3d at 1083 ("the co-conspirator has criminal responsibility unless 'the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy.' "); *Broadwell*, 870 F.2d at 603. Accordingly, the defendants' motion is denied as to their *Pinkerton* argument.

E. Coconspirator Hearsay

The defendants claim prejudicial error in the admission of a great deal of evidence as nonhearsay pursuant to Fed. R. Evid 801(d)(2)(E), the coconspirator hearsay exclusion from the hearsay rule. The court admitted this evidence on a joint venture, or agency, theory and held that Rule 801(d)(2)(E) does not require a showing that the alleged conspiracy was for criminal ends:

> [M]y findings under 801(d)(2)(E) . . . are that the five Defendants who remain in the case, along with Ms. Lehr, Mr. Thompson, Mr. Probst, Mr. McGrath and Mr. Eckard, . . . all were participants of a common plan to put together and facilitate and operate and carry out the relationship of Baptist Medical Center and Blue Valley

> Medical Group for the continuum of care. They participated in a joint venture, if you will, for the purposes of 801(d)(2)(E). And whether there was a criminal intent on the part of any or all of those individuals is something which . . . I need not reach. . . . Therefore, the statements of those individuals that were made in the course of that relationship and in furtherance of that relationship are properly admissible against the five Defendants in this case.

Tr. at 9624-25; *see also United States v. Layton*, 855 F.2d 1388, 1398 (9th Cir. 1988). The defendants contend the court's ruling was improper because they believe the hearsay exclusion requires the government to prove by a preponderance of the evidence[27] not only that the declarants were involved in a joint venture, but also that they were involved in a criminal conspiracy. The court does not agree.

This issue is one of first impression in the Tenth Circuit. The court adopts the well reasoned analysis of Judge Alarcon set out in the *Layton* case and believes that the Tenth Circuit, if faced with the question, would agree with that analysis as well. *Layton*, 855 F.2d at 1398-1400. The rule is rooted in agency principles, as are its siblings,

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[27] Evidence proffered pursuant to Rule 801(d)(2)(E) is not admissible unless the trial court finds by a preponderance of the evidence that, among other requirements, a conspiracy existed. *See United States v. Bourjaily*, 483 U.S. 171, 177 (1987). *Bourjaily* does not address whether existence of a criminal conspiracy is a requisite. In that case, if there was a joint enterprise at all, its ends were undeniably criminal and the issue simply did not arise.

Rules 801(c) and 801(d). The court rejects the overly cynical view that 801(d)(2)(E)'s relaxation of hearsay standards is really based on a perceived need to convict criminal conspirators, and, thus, the alleged joint undertaking must have a criminal purpose. The Federal Rules of Evidence do not relax out of expediency other evidentiary standards, merely upon a finding by the court by a preponderance of the evidence that the party or parties against whom the evidence is offered are criminal conspirators. The more sound view, and the one the court adopts, is the one adopted in *Layton* and endorsed by respected commentators Louisell and Mueller:

> Modern authority indicates that the essence of the coconspirator exception is a "combination" among the coventurers, hence that the proponent of a coconspirator statement need not establish by independent evidence that the conspiracy is unlawful. This holding goes far to assure that the coconspirator exception is indeed more properly understood as a "joint venture" exception whose essence is an agreement among the members to pursue some common plan.

4 D. Louisell & C. Mueller, *Federal Evidence* § 427, at 125 (Supp. 1987); *cf. United States v. Bucaro*, 801 F.2d 1230, 1232 (10th Cir. 1986) ("The rule embodies a long-standing doctrine, applicable in both civil and criminal cases, founded on general principles of agency and partnership law."). Because the court found there was such an agreement to pursue a common plan, the evidence in question was properly admitted.

F. Prosecutorial Misconduct

The defendants, and in particular Mr. Anderson, seek a new trial by positing what might be termed a virtual grab bag of arguments falling under the general category of prosecutorial misconduct. As set forth below, the court has carefully considered each of these arguments and found them to be without merit.

1. Preindictment Delay

Claims for preindictment delay receive limited protection under the Due Process Clause of the Fifth Amendment. *United States v. Johnson*, 120 F.3d 1107, 1110 (10th Cir. 1997). "Preindictment delay is not a violation of the Due Process Clause unless the defendant shows both that the delay caused actual prejudice and that the government delayed purposefully to gain a tactical advantage." *Id.* (citations omitted). Investigative delay, as opposed to purposeful delay to gain an advantage, is not proper grist for a due process claim. *United States v. Lovasco*, 431 U.S. 783, 795 (1977).

The defendants raised this motion in their pretrial papers, as well. At that time, the court explained:

> The defendants allegations might, if true, make out a case of preindictment delay. The defendants specifically identify a number of individuals who would have testified on their behalf who have died since the government's investigation began and the specific testimony that would have been offered. The defendants also allege facts which might, at some point, allow the court to infer that the government's delay

> was purposefully designed to gain a tactical advantage, including the government's alleged successful attempts to get Health Midwest to fire some of the defendants and cease paying for their legal expenses.

United States v. Anderson, No. 98-20030-01/-07-JWL, 1999 WL 84290, at *13 (D. Kan. Jan. 8, 1999).

All of the defendants' pretrial allegations fell flat at trial, and their renewed motion falls flat now. The defendants simply did not suffer any actual prejudice from the government's delay in bringing this case, nor did anything occur at trial which led the court to believe the delay was caused by anything other than logistical investigatory reasons.[28] The defendants' arguments concerning the deaths of various witnesses carry little weight because the evidence these witnesses would have offered would have been cumulative. *See United States v. Comosona*, 848 F.2d 1110, 1114 (10th Cir. 1988) (defendant did not show prejudice because of unavailable witnesses where the witnesses' testimony would have been cumulative). Moreover, the merit of the defendants' motion is highly suspect because, as the government points out, two of the now-dead witnesses on whom the defendants seek to rely died long before the government's investigation at Baptist even began. The defendants' arguments concerning government efforts to get the hospital executives fired or to get Health Midwest to stop paying their legal bills have no merit because the jury never learned

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[28] Because the allegations do not make out a case of actual prejudice, the court denies the defendants' motions for a hearing on this issue.

that Mr. Anderson had been fired or that Mr. McClatchey had been placed on administrative leave and the defendants do not allege that Health Midwest actually stopped paying either executive's legal bills.

2. Judicial Immunity

The defendants ask the court to grant a new trial to allow it to grant judicial immunity to certain defense witnesses. The defendants claim that the prosecutor's broad approach to identifying potential coconspirators for purposes of Fed. R. Evid. 801(d)(2)(E) eviscerated their ability to put on a defense because many of the people identified refused to testify on Fifth Amendment self-incrimination grounds. According to the defendants, this was a purposeful tactic by the prosecution to preclude them from putting on helpful witnesses.

The court rejects the defendants' arguments for the same reasons it rejected them before and during trial. The court denied the defendants' request to provide judicial immunity to selected witnesses because Tenth Circuit law indicates that "courts have no power to independently fashion witness use immunity under the guise of due process. . . . [T]he power to apply for immunity . . . is the sole prerogative of the [executive branch of] government." *United States v. Hunter*, 672 F.2d 815, 818 (10th Cir. 1982). Despite the defendants' arguments, there is no indication that the government engaged in a "deliberate attempt to distort the fact finding process." *See id.*

(reserving ruling on whether judicial immunity was appropriate in such highly offensive situations).[29]

3. Other Alleged Misconduct

The defendants seek a new trial because of claimed government outrageous conduct, both before trial and during trial, in the form of intimidation of witnesses and improper remarks to the jury. The court denies the motion because despite instances of prosecutorial excess, the misconduct did not reach the level of a due process violation.

The touchstone of due process analysis in cases of alleged prosecutorial misconduct is "the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips,* 455 U.S. 209, 220 (1982). To justify a new trial, "[t]he relevant question is whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Darden v. Wainwright,* 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974); *United States v.*

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[29] As an alternative form of relief, the court granted the defendants an opportunity under the residual exception to the hearsay rule, *see* Fed. R. Evid. 807 (hearsay not subject to any exception may be admitted if, among other requirements, it has equivalent circumstantial guarantees of trustworthiness), to call the attorneys of some of these witnesses to testify concerning what the witnesses told FBI agents in government interviews. *See* Tr. at 9321 ("[I]n place of the oath which we frequently look to as a guarantee of reliability, we have 18 U.S.C. § 1001 (crime to make false statements to FBI), which in many respects has more teeth perhaps even than the oath."). The defendants declined the court's offer.

Chapman, 615 F.2d 1294, 1301 (10th Cir. 1980) ("Every slight excess of the prosecution does not require that a verdict be overturned and a new trial ordered.").

The court has reviewed all the alleged misconduct and concludes that most of it was not misconduct at all. For example, of the countless alleged improper remarks in the government's closing, only two were actually improper.[30] The first improper remark was when the government chided the defense for objecting too often under the rules of evidence. *See* Tr. at 9710-12. The court sustained the defendants' objection to this remark, so it caused little, if any, prejudice. The second improper remark was when the government implied the attorney defendants were guilty criminals. *See* Tr. at 9762. This remark may have caused Mr. McClatchey some prejudice, *see supra* part III.B, but it caused no prejudice to Mr. Anderson and the Drs. LaHue. The remainder of the alleged improper remarks at closing were merely proper invitations to the jury to draw inferences in the government's favor and do not represent prosecutorial misconduct. The court has also reviewed various prosecutorial indiscretions such as informing Mr. McGrath that the grand jury thought he was a "lying sack of shit" and threatening Mr. Probst to the effect that an attempt to shade his testimony in the defendants' favor would be met with the prosecutor figuratively shoving the documents "up your ass." In the final analysis, the court believes these remarks, although improper and certainly

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[30] The defendants objected to only three comments during the government's closing argument. Only one of the objections was sustained.

unbecoming for an Assistant United States Attorney, do not rise to the level of a due process violation. *See Chapman*, 615 F.2d at 1301 (slight excess of prosecution is not sufficient to entitle defendants to new trial). Neither of the witnesses appeared to have been intimidated in connection with their testimony and the jury was made aware of the prosecutor's comments for their consideration in evaluating that testimony.

IV. Arrest of Judgment

The defendants move for an arrest of judgment, arguing that the indictment does not state an offense. Pursuant to Fed. R. Crim. P. 34, arrest of judgment is appropriate "if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged." A motion under the rule is limited to the record, including the indictment and verdict, but excluding the evidence at trial. *United States v. Sisson*, 399 U.S. 267, 281-82 (1970).

Defendants' motion for arrest of judgment does not set forth any new arguments. Instead, it "incorporates . . . by . . . reference the legal arguments set forth in . . . prior motions, made prior to trial." In like fashion, the court denies the motion by referencing its carefully articulated pretrial rulings. *See United States v. Anderson*, No. 98-20030-01/-07-JWL, 1999 WL 79654 (D. Kan. Jan. 19, 1999) (denying motion to dismiss indictment for

duplicity, and denying motion to dismiss for failure to state an offense).[31]

V. Production of Sentencing Memo

Although the defendants do not present the court with any authority directly on point, they make a persuasive argument that because the United States Probation Office ("USPO") is treated as an arm of the court, any communications by the government made to an officer of the USPO in connection with the preparation of a presentence investigation report ("PSIR") should be treated like communications to the court itself. In other words, if such communication is to be had, it should not be ex parte, but should be shared with the defendants.[32] The government argues in return that traditionally communications by both prosecution and defense are had with the USPO in this run-up to the preparation of a PSIR without any requirement to furnish copies of memos to the other side or to include representatives of adversaries in face to face meetings. This process has proven helpful to the USPO officers in discharging their responsibility to the court. The government also notes that if the logic of the defendants' argument is to be accepted it would, of course, be

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[31] The court does not readdress the defendants' vagueness as applied arguments because a motion under Rule 34 limits the court's consideration to only the indictment and verdict. *See Sisson*, 399 U.S. at 281-82.

[32] *See, e.g., United States v. Alverson*, 666 F.2d 341, 349 (9th Cir. 1982) ("[I]t is improper for the prosecution to make, or for the court to receive from the prosecution, an ex parte communication bearing on the sentence.").

equally applicable to defendants who also routinely provide input for the preparation of the PSIR.

While the defendants' argument is facially appealing, the court is not persuaded that a blanket prohibition against ex parte contact with officers of the USPO is required by law. The role of the USPO is different from, say, that of the judge's law clerk to whom it would be improper to make an ex parte communication. The USPO receives narratives, suggestions, and even argument from both sides to assist it in preparation of the PSIR. Unlike a law clerk, whose advice to the judge is strictly confidential, however, the USPO officers assemble information and promulgate the PSIR for both informal and formal comment by both sides. The office furnishes this report with an addendum that sets out the reactions and objections of the parties, if any, to the proposed findings and recommendations. Crucially, then, ex parte conduct with the USPO officer has been a traditional and useful part of the investigative process but one which has as a check against impropriety the divulging of the PSIR to the parties with a mandated opportunity for them to present whatever contrasting views they may have to the court through objections, briefs and oral argument.

All that having been said, however, the court does believe that under certain circumstances there is the potential for unfair prejudice to a party as the process has worked. Judges may well accord certain tacit deference to the findings and recommendations of the USPO officers who regularly assist them in the often complex and sometimes befuddling regimen of sentencing under the United States Sentencing Guidelines ("USSG"). Thus, perceptions

of the case, leading to proposed findings and recommendations of a USPO officer, if sufficiently influenced by effective advocacy during the process of preparation of the PSIR, might be difficult to overcome – both on the part of the USPO officer during the objection and consultation phase after the initial draft of the PSIR has been furnished to counsel and by the side who must argue to the judge why a contrary view should be adopted at the sentencing hearing.

In order to resolve this problem, the court believes that it is appropriate to make some differentiation based upon the nature of the contact or submission of papers to the USPO. Routine provision of neutrally presented background facts concerning the parties' respective views of the offense conduct, for example, need not be subject to a stifling requirement of access for the opposing party. When a submission, particularly in writing, becomes blatantly an exercise in advocacy, however, fairness dictates that it be shared with the other side so that the danger of undue influence at the formative stages of this process can be tempered through adversarial scrutiny.[33] Advocacy, as contrasted with the even handed furnishing of information, occurs when, for example, specific recommendations are made about the selection of which guideline to apply (for that is sometimes a crucial threshold decision), what upward or downward adjustments should be made, or how the guidelines should be applied

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[33] *See* D. Conn. R. 10 ("The attorney for the government may submit a 'Government's Version of the Offense' to the Probation Officer and, in that event, shall serve a copy on counsel for the defendant.").

in light of the offense conduct or what might arguably be relevant conduct under the USSG. Advocacy also occurs when case law is presented to the USPO on a point or where argument is made in the submission in an attempt to persuade the USPO on a point. When a party has reasonable suspicion that an opposing party has engaged in advocacy in its ex parte dealings with the USPO, fairness dictates that the party have the opportunity to call this matter to the court's attention and at least ask for an in camera review by the judge to determine whether or not it would be appropriate to compel the side furnishing the alleged advocacy-oriented communication to the opposing side to alleviate the risk of attitudes being hardened at an early stage by a one sided flow of information.

The court has reviewed the government's submission here. It is an advocacy document. The government shall furnish copies of it to counsel for each of the defendants within five calendar days of the date the memorandum and order is filed. In the event the defendants wish to supplement their written submissions to the USPO in light of this document, they may do so within ten calendar days thereafter, with copies to counsel for the government.

IT IS THEREFORE ORDERED BY THE COURT that Dennis McClatchey's motion for acquittal or new trial (Doc. 428) is granted. The clerk will enter judgment of acquittal on all counts. Pursuant to Fed. R. Crim. P. 29(d), Mr. McClatchey is conditionally granted a new trial in the event the judgment of acquittal is hereafter vacated or reversed.

IT IS FURTHER ORDERED that Ronald LaHue's motion for acquittal (Doc. 426) is granted in part and denied in part. The clerk will enter judgment of acquittal on count eight. The motion is denied as to all other counts.

IT IS FURTHER ORDERED that the defendants' motion to compel production of the government sentencing memo (Doc. 420) is granted. The government shall furnish copies of it to counsel for each of the defendants within five calendar days of the date the memorandum and order is filed. In the event the defendants wish to supplement their written submissions to the USPO in light of this document, they may do so within ten calendar days thereafter, with copies to counsel for the government.

IT IS FURTHER ORDERED that Robert LaHue's motion for acquittal or new trial (Doc. 427), Dan Anderson's motion for acquittal, new trial, or arrest of judgment (Doc. 432), Ronald LaHue's motion for new trial (Doc. 425), and all defendants' motion to dismiss based on preindictment delay (Doc. 423) are denied.

IT IS SO ORDERED.

Dated this 21st day of July, 1999 at Kansas City, Kansas.

/s/ JOHN W. LUNGSTROM
John W. Lungstrom
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DAN ANDERSON, Defendant-Appellant,	)	No. 99-3347
THE AMERICAN HOSPITAL ASSOCIATION, THE FEDERATION OF AMERICAN HEALTH SYSTEMS, THE ASSOCIATION OF AMERICAN MEDICAL COLLEGES, THE AMERICAN OSTEOPATHIC ASSOCIATION, THE MISSOURI HOSPITAL ASSOCIATION, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, Amici Curiae.	)	

ORDER

Filed July 24, 2001

Before **ANDERSON, BALDOCK** and **BRORBY**, Circuit Judges.

This matter is before the court on appellant's "Motion for Leave to File Supplemental Brief". Appellant's motion is granted. Appellant's supplemental brief, previously received by the court, has been docketed as filed as of the date of this order. Within 10 days of the date of this order, appellee may file a response.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: Steve Larson
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROBERT C. LAHUE, Defendant-Appellant.	)	No. 99-3344
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DAN ANDERSON, Defendant-Appellant.	)	No. 99-3347
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RONALD H. LAHUE, Defendant-Appellant.	)	No. 99-3352
THE AMERICAN HOSPITAL ASSOCIATION, et al., Amici Curiae.	)	

ORDER

Filed August 29, 2001

Before **ANDERSON, BALDOCK** and **BRORBY**, Circuit Judges.

This matter is before the court on the appellants' motions to stay the mandate pending petition for writ of certiorari to the Supreme Court of the United States. The motions are denied.

The mandate will be issued as of the date of this order.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: Kevin Schwalbe
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DAN ANDERSON, Defendant-Appellant, THE AMERICAN HOSPITAL ASSOCIATION, et al., Amici Curiae.	)	No. 99-3347

ORDER

Filed October 25, 2001

Before **ANDERSON, BALDOCK,** and **BRORBY,** Circuit Judges.

This matter is before the court on appellant's "Motion to Recall the Mandate". The motion is denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: Steve Larson
Deputy Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROBERT C. LAHUE, Defendant-Appellant.	)	No. 99-3344
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DAN ANDERSON, Defendant-Appellant.	)	No. 99-3347
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RONALD H. LAHUE, Defendant-Appellant.	)	No. 99-3352
THE AMERICAN HOSPITAL ASSOCIATION; FEDERATION OF AMERICAN HEALTH SYSTEMS; ASSOCIATION OF AMERICAN MEDICAL COLLEGES; AMERICAN OSTEOPATHIC ASSOCIATION; MISSOURI HOSPITAL ASSOCIATION; NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, Amici Curiae.	)	

ORDER
Filed August 17, 2001

Before **ANDERSON**, **BALDOCK** and **BRORBY**, Circuit Judges.

These matters are before the court on appellants' petitions for panel rehearing and for rehearing en banc. The petitions for rehearing are denied.

The petitions for rehearing en banc were transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and no judge in regular active service on the court requested that the court be polled, those petitions are also denied.

A revised panel opinion is attached to this order.

Entered for the Court

PATRICK FISHER, Clerk of Court

By: /s/ Keith Nelson
Keith Nelson
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 99-3347

UNITED STATES OF AMERICA,

Appellee,

v.

DAN ANDERSON,

Appellant.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
THE HONORABLE JOHN W. LUNGSTRUM

APPELLANT'S SUPPLEMENTAL BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from the sentence entered by the Honorable John W. Lungstrum, United States District Judge from the District of Kansas. Dan Anderson was

charged in two counts with conspiracy to violate the Medicare Anti-Kickback Statute, and a substantive charge of violating the statute, all in violation of 18 U.S.C. § 371 and 42 U.S.C. § 1320a-7b(b). Mr. Anderson pled not guilty to all counts and proceeded to trial. Following the close of all the evidence, the jury returned verdicts of guilty as to all counts. The district court imposed a sentence of 51 months imprisonment and a $75,000 fine. The judgments and sentences of the lower court were entered on October 28, 1999. Mr. Anderson timely filed his notice of appeal on November 5, 1999. The district court entered an amended judgment and acquittal on November 9, 1999. Out of an abundance of caution, Mr. Anderson filed an amended Notice of Appeal on November 12, 1999. The district court had jurisdiction under 18 U.S.C. § 3231. The jurisdiction of this Court is valid under 28 U.S.C. § 1291, appeal from final decision.

ISSUE PRESENTED FOR REVIEW

WHETHER THE DISTRICT COURT ERRED IN ENHANCING DEFENDANT ANDERSON'S SENTENCE 15 LEVELS UNDER §§ 2F1.1 AND 3B1.1 OF THE UNITED STATES SENTENCING GUIDELINES, THEREBY INCREASING ANDERSON'S MINIMUM POSSIBLE SENTENCE UNDER THE GUIDELINES, WHEN THE FACTS SUPPORTING THE ENHANCEMENTS WERE NOT CHARGED IN THE INDICTMENT, SUBMITTED TO THE JURY AND PROVEN BEYOND A REASONABLE DOUBT.

STATEMENT OF THE CASE

Defendant Dan Anderson files this Supplemental Brief to call to the Court's attention a new rule of constitutional criminal procedure: the Supreme Court's recent decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000).[1] As a new rule of constitutional criminal procedure, the rule announced in *Apprendi* applies retroactively to cases pending on direct review. *See United States v. Heckard*, 238 F.3d 1222, 1234 (10th Cir. 2001); *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708 (1987). *See also Peterson v. Shearson/American Exp., Inc.*, 849 F.2d 464, 466 (10th Cir. 1988) (absent injustice, an appellate court should apply case law in effect when its decision is rendered); *United States v. Charley*, 189 F.3d 1251, 1279 (10th Cir. 1999) (Holloway, C.J., concurring and dissenting) (recognizing that 10th Circuit precedent supports permitting a party to raise a new issue on appeal, contrary to the general waiver rule, because of an intervening change in law); *United States v. Byers*, 740 F.2d 1104, 1115 n. 11 (D.C. Cir. 1984) (en banc) (en banc court accepted the general proposition that an intervening change in the law may justify raising an issue for the first time on petition for rehearing).

Because *Apprendi* was decided after Mr. Anderson's Appellant's Brief had been filed in the instant case, he did not raise the sentencing issues addressed in *Apprendi* in his initial brief. And, Mr. Anderson notes that it is not yet settled whether he could raise any *Apprendi* issues in a

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[1] Mr. Anderson has filed concurrently herewith a motion for leave to submit this brief.

proceeding providing collateral review of his conviction under 28 U.S.C. § 2255.[2]

Therefore, out of an abundance of caution, Mr. Anderson raises this issue now when it is cognizable on direct appeal, in the interest of ensuring that the lower court's imposition of sentence in this case is reviewed relating to the *Apprendi* decision.

STATEMENT OF FACTS

Defendant Dan Anderson was convicted of one count of conspiracy, in violation of 18 U.S.C. § 371, and one count of illegal remuneration and aiding and abetting, in violation of 42 U.S.C. § 1320a-7b(2)(A) and (B). After sentencing memoranda were filed in the trial court in this case by both the government (Doc. 467)[3] and counsel for

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[2] *See, e.g., United States v. Sanders*, 247 F.3d 139, 146 (4th Cir. 2001) and *Jones v. Smith*, 231 F.3d 1227 (9th Cir. 2000) (holding that *Apprendi* was does not apply retroactively to collateral review of convictions). *Compare United States v. Murphy*, 109 F.Supp.2d 1059 (D. Minn. 2000); *Darity v. United States*, 124 F.Supp.2d 355 (W.D.N.C. 2000); *Parise v. United States*, 135 F.Supp.2d 345, 349 (D. Conn. 2001) (all holding that *Apprendi* applies retroactively in habeas corpus proceedings). *Cf. People v. Burns*, 2001 Ill. App. LEXIS 173 (Appellate Court of Illinois, March 29, 2001) (containing detailed discussion of the retroactive applicability of Apprendi on collateral review of convictions).

[3] References to the record and transcript will be by district court docket sheet number and page (Doc. ___ at ___). As explained in Anderson's opening Brief, p. 2 n.1, the record was transmitted in three submissions, and the contents are not in any particular order. To aid the Court, Appellant included in the Addendum to his opening Brief a chart showing where docket

Mr. Anderson (Doc. 466), the trial court issued a Memorandum and Order on October 6, 1999 (Doc. 479) imposing at the government's request a four-point enhancement for Mr. Anderson under U.S.S.G. § 3B1.1(a), for his role as an "organizer" or "leader" of the alleged criminal activity in this case. (Doc. 479 at 2 and 12-15).

The parties subsequently appeared for Mr. Anderson's sentencing on October 28, 1999. (Doc. 363 at 1). At the sentencing hearing, the court noted that Mr. Anderson's base offense level under the Sentencing Guidelines was provided by U.S.S.G. § 2B4.1, the section providing for commercial bribery. (Doc. 363 at 6). The base offense level under this section is 8. The court then turned its attention to the value of the bribes at issue in this case, finding that the value of the bribes paid by Baptist Hospital was more than $800,000, but less than $1,500,000. (Doc. 363 at 6 and 15). Thus, under U.S.S.G. § 2F1.1, the court imposed an 11-point enhancement to Mr. Anderson's base offense level of 8 under the guidelines. (Doc. 363 at 19-20).

The court thus ultimately concluded, based on Mr. Anderson's base offense level of 8 under U.S.S.G. § 2B4.1, his 11-point enhancement under U.S.S.G. § 2F1.1, and his four-point enhancement under U.S.S.G. § 3B1.1, that the total offense level of Mr. Anderson under the Guidelines was 23, and that because of his lack of a prior criminal history, his criminal history category was I. (Doc. 363 at 21). The court then noted that, with an adjusted offense

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sheet entries are found in the submissions, as well as a copy of the district court clerk's summaries of the record.

level of 23, the guidelines called for a sentence of imprisonment for Mr. Anderson of 46 to 57 months. (Doc. 363 at 53). The court imposed a sentence of 51 months imprisonment on Counts 1 and 3, to be served concurrently. (Doc. 363 at 53). In so doing, the court took care to note that, because of its findings that elevated Mr. Anderson's offense level from 8 to 23, the guidelines "mandat[ed] a sentence of imprisonment," and further noted that it was "duty bound to apply" the Guidelines. (Doc. 363 at 45).

Mr. Anderson's appeal of this judgment follows.

SUMMARY OF ARGUMENT

Mr. Anderson's base offense level under the sentencing guidelines was adjusted upward by the district court upon its consideration of "relevant conduct" (Doc. 363 at 6, 15, 21, and 53) that was neither charged in the indictment, nor determined beyond a reasonable doubt by the jury. Mr. Anderson's minimum available sentence under the guidelines was thereby drastically increased. The district court's alteration of the *minimum* sentence available to Mr. Anderson within the sentencing range prescribed by Congress, without the facts supporting the alteration having been found by the jury, is contrary to the principles espoused in *Apprendi v. New Jersey* and other recent Supreme Court precedent that uncharged facts which increase a defendant's minimum possible sentence under the guidelines must be submitted to the jury and proven beyond a reasonable doubt.

Apprendi and its predecessors suggest that the Constitution requires juries to assess any fact that alters the

congressionally prescribed *range* of penalties, which encompasses *facts that increase the minimum* as well as the maximum permissible sentence. For this reason, the district court erred, in that the relevant conduct considered by the district court in imposing Mr. Anderson's sentence was required to have been charged in the indictment, and proved to the jury beyond a reasonable doubt.

ARGUMENT

I. THE DISTRICT COURT ERRED IN ENHANCING DEFENDANT ANDERSON'S SENTENCE 15 LEVELS UNDER §§ 2F1.1 AND 3B1.1 OF THE UNITED STATES SENTENCING GUIDELINES IN THAT THE FACTS SUPPORTING THE ENHANCEMENTS WERE NOT CHARGED IN THE INDICTMENT, SUBMITTED TO THE JURY AND PROVEN BEYOND A REASONABLE DOUBT, ALL IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS AS ESTABLISHED IN *JONES* AND *APPRENDI*

A. Introduction and Standard of Review

Mr. Anderson's base offense level under the sentencing guidelines was adjusted upward by the district court upon its consideration of "relevant conduct" (Doc. 363 at 6, 15, 21, and 53) that was neither charged in the indictment, nor determined beyond a reasonable doubt by the jury. The jury made no finding as to the value of the bribes allegedly paid in this case, nor that Mr. Anderson was an "organizer" or "leader" of a criminal activity that involved five or more participants. (Doc. 405; Doc. 408). The court nonetheless made these findings under a less exacting standard of proof than that which would have

been applied by the jury, and accordingly imposed a sentence within the 46-57 month range, (Doc. 363 at 53), rather than within the 0-6 month range within which Mr. Anderson would have been sentenced had the sentence been imposed under facts found solely by the jury. As such, Mr. Anderson was exposed to a far greater range of sentencing than that which the judge would have had legal authority to impose absent his consideration of that relevant conduct.

Mr. Anderson contends that the district court's alteration of the *minimum* sentence available to him within the sentencing range prescribed by Congress, without the facts supporting the alteration having been found by the jury, is contrary to the principles espoused in *Apprendi v. New Jersey* and other recent Supreme Court precedent that uncharged facts which increase a defendant's *minimum* possible sentence under the guidelines must be submitted to the jury and proven beyond a reasonable doubt. Under these circumstances, the enhancements cannot withstand constitutional scrutiny. *See Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000).

Although this Court has recently stated that the narrow holding of *Apprendi* is not implicated when a defendant's sentence falls below the basic statutory maximum, *see United States v. Heckard*, 238 F.3d 1222, 1235-36 (10th Cir. 2001), this Court did not address in *Heckard* the precise argument made herein, i.e., that it is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed *minimum* sentence to which a criminal defendant is exposed.

With regard to the sentencing guidelines, this Court reviews contested issues of law and legal principles *de novo*. *United States v. Goddard*, 929 F.2d 546, 548 (10th Cir. 1991).

B. *Discussion*

The *Apprendi* decision is founded upon the well-settled notion that elements of crimes are subject to full constitutional protection, including charging by indictment or information, and proof to a jury beyond a reasonable doubt. *Apprendi*, 120 S.Ct. at 2356 (*citing United States v. Gaudin*, 515 U.S. 506, 510, 115 S.Ct. 2310 (1995), and *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068 (1970)). In accordance with this principle, the Supreme Court expressly recognized in *Apprendi* that "constitutional limits exist to [legislatures'] authority to define away facts necessary to constitute a criminal offense," and therefore that facts not formally identified by the legislature to be elements of a substantive offense, but that operate to enhance a defendant's sentence, may also trigger full due process protections in some circumstances. *Apprendi*, 120 S.Ct. At 2360 (*citing McMillan v. Pennsylvania*, 477 U.S. 79, 86 (1986) (recognizing that "in certain limited circumstances, *Winship's* reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged")).

Indeed, the *Apprendi* Court acknowledged that full due process protections may be required in situations in which the sentence enhancing statute gives the "impression of having been tailored to permit the [necessary sentence enhancing] finding to be a tail which wags the

dog of the substantive offense." *Apprendi*, 120 S.Ct. at 2361 (*citing McMillan*, 477 U.S. at 88). And, with respect to the relevant conduct provisions of the United States Sentencing Guidelines, the Court has suggested in dicta that if "the range [of punishment for the substantive offense] fixed by Congress is so broad, and the [sentence] enhancing role played by the relevant conduct so significant," then consideration of that conduct in sentencing may rise to the level of "a tail which wags the dog of the substantive offense." *Witte v. United States*, 515 U.S. 389, 403 (1995).

These principles espoused in *Apprendi* plainly implicate the practice of considering uncharged conduct in enhancing a defendant's *minimum* sentence under the United States Sentencing Guidelines. *See* Proposed Modifications to the Relevant Conduct Provisions of the United States Sentencing Guidelines, p. 21 n. 146 (American College of Trial Lawyers, 2001). The majority opinion in *Apprendi* expressly endorses Justice Scalia's & Justice Stevens' concurrences from *Jones v. United States*, 526 U.S. 227, 253 (1995). *Apprendi v. New Jersey*, 120 S. Ct. 2348, 2363 (2000). Justice Scalia's concurrence in *Jones* considers any alternation in the *range* of sentencing upon consideration of facts not found by the jury that operates to the defendant's detriment to be unconstitutional: "I set forth as my considered view, that it is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed *range* of penalties to which a criminal defendant is exposed." *Jones*, 526 U.S. at 253 (Scalia, J., concurring) (emphasis added). Justice Stevens' concurrence in Jones, which was also cited with approval in *Apprendi*, *see Apprendi*, 120 S.Ct. at 2363, reiterated

Justice Scalia's conclusion that the constitution requires juries to assess "facts that alter the congressionally prescribed *range* of penalties," explaining that "this principle encompasses *facts that increase the minimum* as well as the maximum permissible sentence." *Id.* at 253-54 (Stevens, J., concurring) (emphasis added).

Furthermore, in his concurring opinion in *Apprendi*, Justice Thomas stated that any fact which triggers a mandatory *minimum* sentence should be treated as an element and submitted to the jury under a reasonable doubt standard. *Apprendi*, 120 S.Ct. at 2379 (Thomas, J., concurring). And, although the majority in *Apprendi* noted that the United States Sentencing Guidelines were not at issue in the case before the Court, *id.* at 2366 n.21, Justice O'Connor's dissenting opinion reads the majority as threatening "all determinate-sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations (*e.g.*, the federal Sentencing Guidelines)." *Id.* at 2391 (O'Connor, J., dissenting).

This "threat" to the Guidelines' relevant conduct provisions, as Justice O'Connor described it, is grounded in the notion that, although substantive criminal statutes set the maximum sentence for a crime, the Sentencing Guidelines in fact determine the range of sentencing available to the trial court in any given case. *See United States v. Watts*, 519 U.S. 148, 166, 117 S.Ct. 633, 642 (1997) (Stevens, J., dissenting). *See also United States v. Kinter*, 235 F.3d 192, 200 (4th Cir. 2000) and *United States v. Norris*, 128 F.Supp.2d 739, 742 (E.D.N.Y. 2001) (acknowledging that "there is . . . a colorable argument" that the Sentencing Guidelines themselves provide the "prescribed statutory

maximum" to which *Apprendi* refers). Thus, the Guidelines have the practical effect that, based on a finding of fact made by the judge rather than the jury, a defendant is exposed to far greater ranges of sentencing than that which the judge would have had legal authority to impose absent consideration of the "relevant conduct." *Watts*, 519 U.S. at 166 n.4 (Stevens, J., dissenting). As noted previously, a number of Justices have unequivocally deemed this practice constitutionally impermissible.

Accordingly, Mr. Anderson contends that, in this case, the uncharged relevant conduct considered by the district court in adjusting upward his base score under the Sentencing Guidelines so dramatically increased his *minimum* available guideline sentence, and so significantly increased the range of sentencing that was available to the trial court under the guidelines, that in effect, the district court's consideration of that conduct became "a tail that wagged the dog of the substantive offense." As such, the relevant conduct considered by the district court below in imposing Mr. Anderson's sentence merited the full constitutional protections set forth in *Winship*, including charging the conduct in the indictment, and proof beyond a reasonable doubt of the conduct to the jury. *See Winship*, 397 U.S. at 364.

To illustrate, Mr. Anderson was charged with and convicted of illegal remunerations under 42 U.S.C. § 1320a-7b, and was accordingly sentenced under the Commercial Bribery provisions of U.S.S.G. § 2B4.1, which carries a base offense level of 8. (Doc. 363 at 6). Under this base offense level, under criminal history category I, Mr. Anderson's Guideline sentencing range was 0-6 months, with an authorized sentence of probation. See

U.S.S.G. § 5B1.1(a)(1). But, the district court – and not the jury – made findings that the value of the alleged bribes involved in this case was between $800,000.00 and $1,500,000.00, meriting an 11-point increase under U.S.S.G. § 2F1.1. (Doc. 363 at 6; 15; 19-20). The court further found, based on uncharged facts, that Mr. Anderson was an organizer or leader of a criminal activity that involved five or more participants, and accordingly imposed a four-point increase to Mr. Anderson's base score, pursuant to U.S.S.G. § 3B1.1. (Doc. 479 at 2: 12-15).

Thus, after the district court determined these uncharged facts, Mr. Anderson's offense level under the Sentencing Guidelines was raised to 23, which requires a sentencing range of 46-57 months, under which a sentence of probation was unavailable. As such, the 46-month minimum sentence of imprisonment available to Mr. Anderson far exceeded the minimum sentence that could have been imposed – i.e., zero months – had the court considered solely the facts determined by the jury in sentencing Mr. Anderson. This alteration of the minimum sentence within the sentencing range prescribed by Congress, without the facts supporting the alteration having been found by the jury, runs afoul of the principle espoused in *Apprendi* and other recent Supreme Court precedent that uncharged facts which increase the *minimum* possible sentence under the guidelines must be submitted to the jury and proven beyond a reasonable doubt. *See Jones*, 526 U.S. at 253-54 (Scalia, J., concurring, and Stevens, J., concurring); *Apprendi*, 120 S. Ct. at 2363 (majority expressly approving Justice Scalia's and Justice Stevens' concurring opinions in Jones); *Apprendi*, 120 S. Ct. at 2379 (Thomas, J., concurring).

As such, the relevant conduct considered by the district court in imposing Mr. Anderson's sentence was required to have been charged in the indictment, and proved to the jury beyond a reasonable doubt. Because those protections were not afforded in the court below, the judgment must be reversed.

CONCLUSION

For the foregoing reasons, in the event that Mr. Anderson's conviction is not vacated in its entirety, Mr. Anderson prays that this Court vacate his sentence and remand to the district court for resentencing in accordance with his unadjusted base offense level of 8 under the Sentencing Guidelines.

Respectfully submitted,

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I hereby certify that two true and correct copies of the above and foregoing were sent by First Class mail, postage prepaid, this 6th day of July, 2001, to:

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Dear Tom:

Please forgive the delay in responding to your letter of October 24, 1985, in which you inquired about the propriety of two proposals pertaining to physician participation in joint ventures involving physical therapy clinics.

As you know, the Department of Justice, the Inspector General, and the General Counsel prefer that we not state definitively that particular business arrangements would not violate section 1377(b) of the Social Security Act. This would be true regardless of the degree of specificity contained in the proposals. In regard to the proposals you submitted to us for review, our inability to respond in a helpful manner is compounded by the fact that these are general conceptual proposals, rather than specific and detailed contracts between particular parties.

Nevertheless, as you are aware from our prior conversations, any arrangement whereby individuals receive remuneration from an entity to which they refer Medicare beneficiaries for services will raise serious questions if the remuneration (1) is not a dividend based exclusively on a legitimate (i.e., purchased) ownership interest in the entity of (2) is not for actual services rendered to the entity. Even where one of the above conditions applies, the arrangement may be questioned if (1) the apparent ownership interest appears to be merely a facade to shield a so-called "limited partner" who is the source of

referrals from potential liability under the kickback provision (i.e., the dividends actually paid do not bear a direct relationship to the individual's capital investment share) or (2) as was the case in *Greber*, the payments, although justified on the basis of services rendered by the individuals, appear intended primarily to induce referrals and bear some relationship to the number of referrals.

From the brief descriptions of the two proposals you sent us, it strikes me that either one has the potential to be implemented in a manner prohibited by the kickback provision. In particular, Dr. Silver's proposal states that "physicians will be reimbursed based on an equation involving the number of PT referrals per month and the number of equity shares purchased," and the PTS proposal is unclear regarding the services that will actually be required of each Physicians Group in return for the $36,000 monthly retainer.

You alluded to these aspects of each proposal in your cover letter. All I can do is concur with your apparent concern that the legitimacy of these provisions appears dubious.

Sincerely,

Harvey A. Yampolsky
Assistant General Counsel
Inspector General Division

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

INSTRUCTION NO. N

The crime of Medicare fraud, as charged in Count 2 of the indictment, has three essential elements, which are:

One, defendant knowingly and willfully solicited and received remuneration;

Two, the remuneration was solicited and paid primarily in order to induce and in exchange for the referral of a patient insured by Medicare; and

Three, that the patient's services were covered in whole or in part by Medicare.

For you to find a defendant guilty of the crime of Medicare fraud, the Government must prove all of these essential elements beyond a reasonable doubt as to that defendant, otherwise you must find the defendant not guilty of this crime under Count 2.

From *United States v. Jain*, Nos. 94-00087-01, 94-00087-02-CR-W-6 (W.D. Mo. 1995)

Supreme Court, U.S.
FILED
DEC 14 2001
CLERK

Nos. 01-806, 01-7087 and 01-7152

IN THE

Supreme Court of the United States

DAN H. ANDERSON, ROBERT C. LAHUE
AND RONALD H. LAHUE

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* AMERICAN HOSPITAL ASSOCIATION FEDERATION OF AMERICAN HOSPITALS ASSOCIATION OF AMERICAN MEDICAL COLLEGES AMERICAN OSTEOPATHIC ASSOCIATION MISSOURI HOSPITAL ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1/]

The *Amici* are the nation's leading representatives of hospitals, allopathic medical schools and their faculty physicians, and osteopathic physicians. We urge the Court to review an issue of deep concern raised by these Petitions: Whether 42 U.S.C. § 1320a-7b(b) (the "Anti-kickback Statute") criminalizes health care financial arrangements that inherently involve referrals.

Referrals are typically an intrinsic and necessary part of contemporary arrangements between hospitals and physicians. Although the Tenth Circuit seemed to acknowledge this reality in its opinion, it created a conflicting standard that appears to require that lawful financial arrangements be devoid of any such inherent referrals. The practical effect of this standard is that jurors will likely find innocent conduct criminal. *Amici* seek review because this decision casts a cloud over a wide array of heretofore acceptable hospital-physician arrangements that inherently involve referrals.

Amici are five hospital and medical organizations, representing approximately 5,000 hospitals, 125 U.S. medical schools, and 30,000 osteopathic physicians. *Amici* are dedicated to the delivery of quality, cost-effective health care and constantly seek to improve the nation's health care system. *Amici* share the government's concern with fraud and abuse, and they support efforts directed at prevention and punishment of

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1/ No party or party's counsel in this matter has authored any part of this brief in whole or in part, nor has any person or entity other than the *Amici*, their members, and their counsel made any monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. The parties' written consents to the filing of this brief have been lodged with the Clerk.

providers who commit fraud.[2/] But well-intentioned efforts to eradicate fraud could jeopardize standard health care practices that are not within the Anti-kickback Statute's plain meaning and do not raise concerns that the fraud and abuse statutes were meant to prevent.

Each of the *Amici* is a long-standing leader among organizations of hospital and medical providers and educators. The American Hospital Association ("AHA"), a nonprofit association founded in 1898, is the primary national membership organization for hospitals and health systems in the United States. Its membership includes nearly 5,000 hospitals, health systems, networks, and other health care providers. The AHA's mission is to advance the health of individuals and communities; the AHA leads, represents, and serves health care provider organizations that are accountable to the community and committed to health improvement.

The Federation of American Hospitals is the national representative of 1,700 privately owned or managed community hospitals and health systems throughout the United States. Its members range from small rural hospitals to large urban medical centers and offer a variety of services including acute hospital care, outpatient services, skilled nursing care, rehabilitation, and psychiatric care.

The Association of American Medical Colleges ("AAMC") is a nonprofit association comprised of 125 accredited U.S. medical schools; 16 accredited Canadian medical schools; more than 400 major teaching hospitals and health systems, including 70 Department of Veterans Affairs medical centers; over 90 academic and

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2/ *Amici* express no view as to the application of the properly interpreted law to the facts of this case.

professional societies representing 75,000 faculty members; and the nation's medical students and residents. The AAMC seeks to strengthen the quality of medical education and training, to enhance the search for biomedical knowledge, to advance research in health services, and to integrate education into the provision of effective health care.

The American Osteopathic Association ("AOA"), an Illinois nonprofit corporation with approximately 30,000 osteopathic physicians as members, is the national professional association for osteopathic physicians and osteopathic medicine. Organized in 1897 to advance the philosophy and practice of osteopathic medicine, the AOA accredits colleges of osteopathic medicine, approves osteopathic postdoctoral training programs (i.e., internships, residencies and fellowships), inspects and accredits hospitals throughout the United States, and offers a program of board certification for osteopathic physicians in 18 medical specialties.

The Missouri Hospital Association ("MHA"), a nonprofit membership corporation, represents approximately 140 hospitals throughout Missouri. MHA members include most of the nonprofit and for-profit hospitals, children's hospitals, federal and state hospitals, rehabilitation and psychiatric care facilities, and specialty hospitals in Missouri.[3/]

3/ When the relationships at issue in this case were formed, Baptist Medical Center ("Baptist") was not part of an integrated health care delivery system. However, in 1991 Baptist joined such a system with Health Midwest as its sole corporate member. Richard Brown is the Chief Executive Officer of Health Midwest and is a member of MHA's Board of Trustees, currently serving as Treasurer. The Petitioner, Dan Anderson, served as the Chief Executive Officer of Baptist at the time of the transactions that are at issue in the case below, and for a

ARGUMENT

MOST ARRANGEMENTS BETWEEN HOSPITALS AND PHYSICIANS INHERENTLY INVOLVE REFERRALS AND ARE JEOPARDIZED BY THE STANDARD APPLIED IN THIS CASE BY THE TENTH CIRCUIT

Petitioners validly challenge the jury instruction that the Tenth Circuit approved in the decision below in *United States v. LaHue*, 261 F.3d 993, 1008 (10th Cir. 2001), and previously in *United States v. McClatchey*, 217 F.3d 823, 834-35 (10th Cir.), *cert. denied*, 531 U.S. 1015 (2000).[4/] Although the Tenth Circuit considered the implications for the health care community of its broad interpretation, its decision wrongly puts most arrangements between hospitals and physicians at risk by permitting the jury to convict unless it finds that the reason for the financial arrangement is "entirely distinct" from any "hope for" referrals. *LaHue*, 261 F.3d at 1008; citing *McClatchey*, 217 F.3d at 834 & n. 7. The many benign financial arrangements between hospitals and physicians that intrinsically involve referrals can rarely survive this standard. In today's health care system, inherent referrals are an inseparable part of the lawful motivation for hospital-physician arrangements.

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period of time during the 1990s served as Chief Operating Officer of Health Midwest. He also was a member of the Board of Trustees of MHA for most of the 1980s, serving as chairman of the Board in 1985.

4/ The jury instructions adopted by the Tenth Circuit has its origins in the "one purpose" test applied by the Third Circuit in *United States v. Greber*, 760 F.2d 68 (3d Cir. 1985). In *Greber*, the Third Circuit held that the Anti-kickback Statute was violated where "one purpose" of the remuneration was to induce referrals, regardless of whether that purpose was the primary or motivating purpose of the transactions. 760 F.2d at 69.

It is therefore essential that the Court, at the earliest opportunity, restore the plain meaning of the Anti-kickback Statute and prohibit financial arrangements between referral sources only where the parties have criminal intent to pay remuneration to induce referrals.

A. Congress Did Not Intend to Condemn All Arrangements That Have "Referrals" as an Inherent Component.

Congress understood that referrals are a natural and perfectly appropriate part of most hospital-physician interactions. Congress's intent was only to deter practices "which have long been regarded by professional organizations as unethical as well as unlawful in some jurisdictions, and which contribute appreciably to the cost of the Medicare and Medicaid programs." S. Rep. No. 92-1230, at 208 (1972) (legislation authorizing the original Anti-kickback Statute). Congress consequently made financial arrangements between referral sources a crime only where the parties paid or received remuneration to induce referrals with criminal intent, i.e. to do something with knowledge their conduct is illegal. *See Bryan v. United States*, 524 U.S. 184, 193 (1998) (interpreting willfulness *scienter* element of Firearms Owners' Protection Act); *United States v. Starks*, 157 F.3d 833, 838 (11th Cir. 1998) (applying *Bryan* to the Anti-kickback Statute).[5] Where a jury cannot find a criminal-inducement nexus

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[5] Paragraphs (1) and (2) of 42 U.S.C. § 1320a-7b(b) make it an offense to receive or pay illegal remuneration in return for, or to induce, (a) the purchasing, leasing or ordering, (b) arranging for, or (c) recommending the purchasing, leasing, ordering; of any good, facility, service or item paid in whole or in part under a Federal health care program.

between the payments and referrals, it should be authorized to acquit.

Contrary to the Anti-kickback Statute's plain meaning, the court below authorized financial relationships between hospitals and physicians only "where the motivation to enter into the relationship is for legal reasons entirely distinct from the collateral hope for or decision to make referrals." *LaHue*, 261 F.3d at 1008.[6] By stringing together the words "motivation," "entirely distinct from," and "collateral hope for . . . referrals," *id.*, the Tenth Circuit disregarded the realities of today's health care system in which hoped-for referrals cannot be separated from the financial relationship. Since referrals are intrinsically part of the customary relationship between hospitals and physicians, the jury should be free to consider this inherent referral component together with other evidence, including payments made at fair market value for legitimate, needed services, in determining whether the arrangement was motivated for legal reasons. The Tenth Circuit's standard equates financial arrangements that include inherent referrals with arrangements that are criminally intended to induce referrals. This is not the standard Congress contemplated, and the statutory language does not warrant such limitations on permissible conduct.

The "entirely distinct" or "wholly for other purposes" standard is likely to confuse jurors because it makes little sense in the real world. Jurors who understand that referrals are a routine and inherent part of

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[6] The District Court instructed the jury that a finding of illegal intent to induce referrals "must, *at least in part*, have been the reason [for] the remuneration . . . ." *McClatchey*, 217 F.3d at 834. Jurors were also instructed that they could acquit only if they concluded that the payments in question were designed "*wholly for other purposes*." *Id.*

a physician's relationship with a hospital, are asked by the Tenth Circuit to impute a criminal purpose to otherwise legitimate relationships.

B. "Referrals" Are an Inherent Component of Relationships Between Hospitals and Physicians.

The Tenth Circuit's decision troubles *Amici* because it conflicts with the complexity of health care delivery. Hospitals can meet the health care needs of the communities they serve only with the assistance and coordination of physicians. Hospital care must be provided by and through arrangements with physicians. Physicians rely upon the assistance and support of the hospital's clinical staff and facilities to diagnose and treat patients.

The definition of the term "referral" includes most of the daily interactions that physicians have with hospitals. When a physician admits a patient with chest pain, it is a "referral." When a physician uses a hospital surgical suite to perform surgery in conjunction with a team of hospital nurses, it is a "referral." When a physician orders a blood test performed by the hospital's laboratory, it is also a "referral." And when a physician discharges a patient and orders post-hospital services in conjunction with hospital discharge planners, it is a "referral." Since physicians are licensed to make medical judgments and order services, a "referral" is a necessary yet intrinsic component of virtually every interaction between a hospital and a physician.

We offer below several examples of common, beneficial hospital-physician relationships that are threatened by the Tenth Circuit Court's mistakenly broad construction of the Anti-kickback Statute. These examples have two common, coexisting features: (1) an

economic relationship is formed that is necessary for patient care; and (2) patients receive needed services from the referrals the physicians have made. These examples, therefore, all involve "remuneration" and "referrals" as a natural part of the relationship, but without the required nexus of criminal inducement.

Clinical and Administrative Services. Hospitals have important medical reasons to contract with physicians to provide clinical services to patients. Similarly, hospitals often ask physicians to provide medical administrative services, such as serving as the medical director of a program or department. The hospital customarily pays the physician for these duties.

A hospital, for example, may have a choice of hiring one of the leading surgeons in the field as a medical director or an accomplished, but lesser known, physician. The leading surgeon will likely bring to the institution prestigious research grants and superior education and training. This surgeon also will likely attract more referrals because of her name recognition. Moreover, when that surgeon agrees to become the medical director of that service, it should surprise no one that she will actually refer her patients to her service at the hospital. When she starts her work at that hospital, she will expect to be paid.

Under the approach of the Tenth Circuit, the simple fact of the surgeon's acceptance of payments coupled with her desire to treat patients for the service she has been chosen to run could be sufficient evidence for the jury to convict her of a crime. Specifically, in our example, the selection of the leading surgeon could be construed as a criminal offense under the Tenth Circuit's test unless the surgeon is selected for "legal reasons" that are "entirely distinct" from the prospect of referrals to the

hospital. *Id.* To avoid the danger of criminal prosecution, the hospital might not select the leading surgeon or that surgeon might tell her patients to go elsewhere. This is an obviously absurd and undesirable result.

Physician Recruitment. Hospitals often consider ways to recruit physicians to locate to the hospital's service area after the completion of residency training. This recruitment usually follows the completion of a community "needs analysis" by which the hospital has identified needs for various categories of physician-specialists in the service area, which may include necessary hospital services based on community demographics. As part of its efforts to recruit a physician, the hospital typically provides the physician with a moving allowance and an income guarantee to ease the financial burden while the physician establishes a private practice. In addition, the physician is asked to obtain and maintain medical staff privileges at the supporting hospital. Since the physician will likely admit patients to the hospital, both elements of the offense are present.[7/]

Flight Programs. As part of their community service, hospitals in urban areas often sponsor flight programs to provide needed specialty care to surrounding rural areas. Physicians on the hospital's medical staff are flown to rural areas to see patients at rural hospitals or clinics. These flights are provided without charge, and

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[7/] In 1978, the Department of Health and Education and Welfare, Office of Program Integrity ("OPI"), the predecessor to today's Department of Health and Human Services, Office of Inspector General ("OIG"), opined that such recruitment practices are permissible under the Anti-kickback Statute. *See* Letter by Director, Office of Program Integrity, dated October 30, 1978. Appendix at 1a.

therefore the physicians may be considered to have received remuneration. Even though the physicians earn fees for the care they provide, the amounts received rarely would justify the flights if they paid the full cost themselves. The primary purpose of the flight programs is to provide needed treatment to patients in a setting close to their home. If more needed services are not available locally, the physician will usually refer the patient to the sponsoring hospital at which she is on the medical staff.

None of the above practices has traditionally been viewed as unethical or as increasing the costs of medical programs or treatments. Absent other aggravating facts, these arrangements to provide needed services and many other everyday practices of hospitals and physicians should not be subjected to criminal investigation and prosecution. Yet in these examples referrals are an inherent, inevitable part of the legal relationship, but they are not "entirely distinct," as required by the Tenth's Circuit's standard.

C. The Court Should Grant Review to Remove the Cloud Cast Over a Wide Array of Benign Health Care Arrangements.

The Tenth Circuit's interpretation of the Anti-kickback Statute is troubling to the health care community because it treats in the same manner relationships that intrinsically involve referrals with those that are entered into unlawfully to induce referrals. As a result, it could criminalize arrangements described in the examples described above, as well as many other common beneficial practices of health care providers.

Congress recognized: "Providers want to comply with the fraud and abuse statute, but many are unsure of how the statute affects them." H.R. Rep. No. 104-496, at 84 (1996). When no meaningful line can be drawn between legal and illegal activity, hospital executives and physicians cannot know what is expected of them. Consequently, "a chilling effect is placed on legitimate arrangements, particularly where providers are attempting to structure new and innovative health care delivery systems to contain health care cost[s]." *Id.* There is no shelter for innovation or for the development of cost-effective programs if a jury may misunderstand these activities and convict under the Anti-kickback Statute.

The Court should therefore grant review because of this chilling effect on existing financial relationships and important new, beneficial programs.

CONCLUSION

Our health care system must be free both from corrupt payment-for-referral scams *and* from the dangerous specter of criminal conviction for legitimate health care arrangements. Congress intended this in enacting the Anti-kickback Statute. *Amici* strongly support the vigorous and fair enforcement of this law. But this Court's prompt assistance is needed to achieve clarity in construing the Anti-kickback Statute to

maintain the legality of traditional financial arrangements between hospitals and physicians while prohibiting only what is unethical and corrupt.

December 14, 2001

Respectfully submitted,

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APPENDIX

DEPARTMENT OF HEALTH EDUCATION AND WELFARE

October 30, 1978

Dear _____:

Secretary Califano has asked me to respond to your October 10 letter to him requesting an opinion as to the legality of certain hospital practices under the Medicare-Medicaid Anti-Fraud and Abuse Amendments, P.L. 95-142.

In the correspondence attached to your letter, questions a situation wherein a remote, rural hospital in California in an effort to induce physicians to practice in the area, guarantees a portion of the physician's salary for one year. There is no explicit agreement with the hospital that the physician must refer his Medicare or Medi-Cal patients (or any of his patients) to that particular hospital. However, since this rural hospital is the nearest within 50 miles, it is most likely that the physician's patients who must be hospitalized would be referred to the local hospital. Specifically, inquiries whether such an arrangement would be a violation of Section 1877(b)(2) of the Social Security Act (42 U.S.C. 1395nn(b)(2)). Since Section 1877(b) is a penal provision, a conclusive determination to whether this or any other arrangement violates the section can only be rendered by the courts. We can, however, offer out thoughts on particular aspects of the arrangement we believe are important in making a determination whether it would be prohibited under the Act.

Since 1972, the Social Security Act has provided specific penalties for transgressions against the Medicare or

Medicaid programs for certain practices that have long been regarded by professional organizations as unethical, which are unlawful in some jurisdictions, and which contribute significantly to the cost of the programs. For example, kickbacks are illegal and improper no matter how a transaction might be construed to obscure the true purpose of a payment. The concern of both Congress and the health care programs administered by the Department of Health, Education, and Welfare is the unnecessary and illegal escalation of health care costs which result from the type of practices prescribed by the anti-Kickback or Rebates Provision (42 U.S.C. 1395nn and 1396h).

In the Medicare-Medicaid Anti-Fraud and Abuse Amendments (P.L. 95-142) Congress acted to clarify, restructure, and strengthen the penalty provisions included in the Social Security Act. Thus, Sections 1877(b)(2) and 1909(b)(2) of the Act were amended to provide:

> Whoever offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person--
>
> (A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whose or in part under this title, or
>
> (B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service or item for which payment may be made in whole or in part under this title,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

The intent of these provisions is not to penalize individuals or entities participating in legitimate business transactions. Rather it is to penalize those who engage in unethical and illegal financial arrangements (such as kickbacks, rebates, or bribes) that unnecessarily increase the costs of Federal health care programs. Many business offer financial inducements to attract competent personnel. The physician recruitment program acts to insure adequate and competent medical care in a remote, rural area. Moreover, the costs of the recruitment program are not reimbursable by either Medicare or Medicaid. This, based on description of the arrangement (a hospital guarantees a portion of physicians' salaries for one year in order to have them practice in the area serviced by the hospital), it would appear that neither the hospital nor the physicians would be in violation of these penal provisions of the Social Security Act.

You, of course, understand that our reply is predicated on an understanding of the arrangement as we interpret letter. If facts or conditions differ from those we understand or infer, there is a possibility that the arrangement might be in violation of the subject provisions of the Act. Should any questions arise to the propriety of an arrangement, or regional office will consult with the appropriate we trust that our comments will be helpful in responding to [_____] questions.

Sincerely yours,

Don Nicholson
Director
Office of Program Integrity